Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

THERESA SHEPPARD,

Petitioner,

vs.

RIVERVIEW NURSING CENTRE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Circuit Court's holding in a case of first impression before it that a District Court must engage in a proportionality analysis before awarding attorney's fees under the Civil Rights Act of 1991 where the plaintiff successfully proves a violation of the prohibition against mixed-motive discrimination is contrary to congressional intent and Supreme Court precedent.

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Petitioner, Theresa Sheppard, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 27, 1996, in order to address an important federal question that has not been, but should be, settled by this Court.

OPINIONS BELOW

The District Court opinion, App. 46a-73a, is reported at 870 F. Supp. 1369 (D. Md. 1994). The Circuit Court opinion, App. 3a-45a, is reported at 88 F.3d 1332 (4th Cir. 1996).

STATEMENT OF JURISDICTION

The Circuit Court rendered its opinion on June 27, 1996, and the mandate of the Court issued on July 19, 1996. App. 3a. This is the judgment sought to be reviewed. On July 29, 1996, the Court, by an 8 to 5 majority, denied the suggestion for rehearing *in banc*. App. 1a-2a. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1245(1).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991 (the "1991 Act"), provides:

> an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment

> practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that it would have taken the same action in the absence of the impermissible motivating factor, the court —
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

STATEMENT OF THE CASE

Petitioner, Theresa Sheppard ("Petitioner" or "Sheppard"), filed suit against Riverview Nursing Centre, Inc. ("Respondent" or "Riverview") in September, 1993 alleging that she was laid off because of her pregnancy in violation of Title VII. App. 46a. At trial, the jury found that Sheppard's pregnancy "was a motivating factor" in the decision to lay her off. *Id.* However, it also found that Riverview would have made

the same decision even if it had not considered Sheppard's pregnancy. App. 47a. Pursuant to the jury's verdict, the District Court entered judgment against Riverview for violating section 2000e-2(m).

The District Court subsequently held that petitioner was entitled to attorney's fees of $40,000. App. 63a. In seeking an award of her attorney's fees, petitioner's counsel voluntarily reduced the fees which had been incurred at their normal and customary rates by approximately fifty percent. App. 51a. In awarding the requested fees, the District Court meticulously and minutely examined each hour's work covered by the fee request, made what it considered appropriate reductions, and, in the exercise of its discretion, determined that the requested fee represented an approximately forty-two percent reduction in the lodestar amount, and that no further reduction was warranted in light of petitioner's moderation. *Id.*

In reversing the lower court, the Court of Appeals for the Fourth Circuit relied extensively upon *Farrar v. Hobby*, 506 U.S. 103 (1992) in holding that the proportionality considerations that informed the *Farrar* Court's decision to deny fees under 42 U.S.C. § 1988 also apply in determining whether to grant or deny fees under section 2000e-5(g)(2)(B). App. 8a. The dissenting opinion observed that "the majority opinion completely frustrates the intent of Congress," and "effectively writes section 2000e-5(g)(2)(B) out of existence: after today, to recover attorney's fees a plaintiff must show more than a violation of section 2000e-2(m) and achieve some level of success beyond what Congress intended." App. 19a-21a.

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURT'S HOLDING THAT A DISTRICT COURT MUST ENGAGE IN A PROPORTIONALITY ANALYSIS BEFORE AWARDING ATTORNEY'S FEES WHERE THE PLAINTIFF SUCCESSFULLY PROVES A VIOLATION OF THE NEW PROHIBITION AGAINST MIXED-MOTIVE DISCRIMINATION IS CONTRARY TO CONGRESSIONAL INTENT AND SUPREME COURT PRECEDENT.

In 1989, the Court held that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). In the wake of that decision, Congress overturned this result by passing the 1991 Act which explicitly authorized courts to award attorney's fees in mixed-motive cases, even though no damages may be awarded under that statute.[1] The Fourth Circuit's decision thwarts the clear

---

1. As the House Committee on the Judiciary stated in its Report on the 1991 Act:

> The Court's holding in *Price Waterhouse* severely undermines protections against intentional discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason.

(Cont'd)

intention of Congress to impose sanctions upon employers who violate this new prohibition against mixed-motive discrimination.

This case of first impression at the Circuit Court level presents issues which, in the absence of Supreme Court review, will have to be addressed in each of the Circuits. All of the district courts which have addressed this issue have explicitly rejected the Fourth Circuit's analysis. *See Hall v. City of Brawley*, 887 F. Supp. 1333, 1346 n. 5 (S.D. Cal. 1995); *Hannon v. Chater*, 900 F. Supp. 1276, 1285 n. 28 (N.D. Cal. 1995). If the Fourth Circuit's decision is allowed to stand, then contrary to Congress' intent, victims of discrimination will have thrown on them the burden of attorney's fees incurred in proving unlawful mixed-motive employment practices, rather than having the burden put on a defendant who acted illegally, and who Congress intended to charge with this burden.[2]

(Cont'd)

> The impact of this decision is particularly profound because the situation is a common one. As the Justice Department observed, "virtually every Title VII disparate treatment case will to some degree entail multiple motives."
>
> If Title VII's ban on discrimination is to be meaningful, proven victims of intentional discri-mination must be able to obtain relief, and perpetrators of discrimination must be liable for their actions.

H.R. Rep. 102-40(II) at 18 (1991), *reprinted*, 1991 U.S.C.C.A.N. 649, 711; (citations omitted); *see* H.R.Rep. 102-40(I) at 45 (1991), *reprinted*, 1991 U.S.C.C.A.N. 549, 583 (the "inevitable effect of the *Price Waterhouse* decision is to permit prohibited employment discrimination to escape sanction under Title VII").

2. As the dissent clearly perceives, "a grant of attorney's fees helps to eliminate discrimination in the workplace because a prospective plaintiff is more

(Cont'd)

Because Sheppard established a violation of § 2000e-2(m) and was awarded declaratory relief, she has achieved all that is required to be awarded her attorney's fees. Notwithstanding the plain language of the 1991 Act, the Circuit Court held that the "proportionality concerns" that informed the *Farrar* Court's decision to deny fees under 42 U.S.C. § 1988 should also apply in determining whether to grant or deny fees under § 2000e-5(g)(2)(B). App. 7. By authorizing District Courts to deny attorney's fees based on the "degree of success" obtained, the majority opinion renders § 2000e-5(g)(2)(B) ineffective and practically meaningless.[3]

Unlike 42 U.S.C. §§ 1988 and 2000e-5(k), the general provision under which a Title VII plaintiff recovers attorney's fees, Congress did not use the words "in its discretion" or "reasonable" in § 2000e-5(g)(2)(B). The majority opinion fails to address the omission of this language which, after its inclusion in analogous provisions, including one within the same statute, strongly indicates that Congress intended a court to have less discretion under section 2000e-5(g)(2)(B). *See*

(Cont'd)

likely to bring suit to enforce the provisions of Title VII if the plaintiff knows that she will be able to recover attorney's fees even if her case evolves into a mixed motive case. Indeed, a grant of attorney's fees reflects Congress' decision that a plaintiff in an employment discrimination case acts not only to vindicate her own interests, but the interests of society as a whole by acting as a 'private attorney general' . . . The majority decision does not directly mention, much less address, these important public goals." App. 27.

3. *See* 2A Norman Singer, *Sunderland on Statutory Construction* § 46.06 at 119-120 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be rendered inoperative or superfluous"); *Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir.), *cert. denied*, 375 U.S. 818 (1963).

Russello v. United States, 464 U.S. 16, 23 (1983) (" '[W]here Congress included particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "), *quoting*, *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C Cir.) ("Where explicit language is used in one part of a statute to mean something and different language is later used, there is a strong inference that the two provisions do not mean the same thing."), *cert. denied*, 469 U.S. 881 (1984).

Moreover, the Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992) does not support the proposition that a district court has broad discretion to deny attorney's fees to a prevailing party if the court feels the particular lawsuit has not served the public interest. Rather, in *Farrar*, the Court held that, when a plaintiff is technically a prevailing party but "recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, ... the only reasonable fee is usually no fee at all." *Id.* at 115. In so holding, the Court observed that "the degree of plaintiff's success goes to the reasonableness" of the fee award under § 1988. *Farrar*, 506 U.S. at 114, *quoting Hensley v. Eckerhardt*, 461 U.S. 424, 436 (1983) (internal quotation marks omitted). Under § 2000e-5(g)(2)(B), however, there is no reasonableness inquiry to make because the word "reasonable" is not found.

This omission is especially significant in view of the acknowledgement in Justice O'Connor's concurring opinion that it would have been "wholly inappropriate" to consider the degree of success, no matter how much sense this approach might make, if Congress had declared a contrary intent in § 1988. *Farrar*, 506 U.S. at 118-19. By deliberately and significantly altering the language in § 2000e-5(g)(2)(B),

Congress did expressly declare a contrary intent even though no damages may be awarded under that statute. The Fourth Circuit's analysis completely disregards the reasoning of the *Farrar* Court by failing to recognize that the "de minimis or technical victory exclusion . . . is part of the determination of what constitutes a reasonable fee." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring).

In holding that district courts have wide discretion in determining the propriety of an attorney's fee award under § 2000e-5(g)(2)(B), the Court also ignored Supreme Court precedent and placed undue emphasis on Congress' use of the word "may" in this provision. This Court has repeatedly recognized that, even where Congress provides that attorney's fees "may" be awarded, a district court's discretion to deny fees to successful civil rights plaintiffs is extremely limited. For instance, the Supreme Court has held that a district court may not deny attorney's fees to prevailing civil rights plaintiffs based on the defendant's good faith under an attorney's fee provision which, like § 2000e-5(g)(2)(B), states that a district court "may" award attorney's fees to the prevailing party. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968) (interpreting Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)).[4] Given that the purpose of the attorney's fee provision was "to encourage individuals injured by racial discrimination to seek judicial relief under Title II," the Court held that a successful Title II plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402.

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4. This provision, in pertinent part, provides that a district court, "in its discretion, *may* allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000a-3(b) (emphasis added).

This Court has applied this important principle to the identical language contained in the attorney's fee provisions of sections 1988 and 2000e-5(k). *See Blanchard v. Bergerson*, 489 U.S. 87, 89 n. 1 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Similarly, the Court has held that, although § 2000e-5(g) of Title VII provides that a court "may" award back pay, back pay may be denied to a successful Title VII plaintiff only in unusual circumstances, *i.e.*, where denial of back pay will not interfere with Title VII's twin goals of making victims of discrimination whole and deterring future violations. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413, 415-21 (1975). In *Albemarle*, the Court also noted that attorney's fees should be awarded to successful Title VII plaintiffs "in all but very unusual" cases. *Albemarle Paper Co.* 422 U.S. at 415. Congress is presumed to have been aware of these Supreme Court decisions when it enacted § 2000e-5(g)(2)(B). *See Cannon v. University of Chicago*, 441 U.S. 677, 697 (1979) (it is always appropriate to assume that Congress knows the law when it enacts a statute).

Finally, as the dissent clearly perceives, "the majority evidently believes that simply establishing liability in a common mixed-motive case serves few public goals." App. 35a. However, by authorizing attorney's fees for successful § 2000e-2(m) plaintiffs via § 2000e-5(g)(2)(B), rather than relying on Title VII's existing attorney's fee provision, Congress expressed its judgment that such victories promote Title VII's goal of eradicating discrimination, and that fees should normally be awarded.[5] *See Bristow v. Drake Street, Inc.*, 41 F.3d 345, 354 (7th Cir. 1994) (§ 2000e-5(g)(2)(B)(i) allows an award of attorney's fees even if plaintiff "suffers no harm by reason of sex that she would not have suffered anyway").

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5. Indeed, as the dissent observed, "[b]y enacting section 2000e-2(m) Congress has expressly decided that establishing liability in a mixed-motive case does in fact promote important public goals." App. 35a.

The majority opinion seems preoccupied with the notion that the "benefit inures primarily to the lawyers in the form of substantial fee recovery, even if relief to the plaintiff is otherwise trivial." App. 11a. However, the outcome that the statute requires does not as the majority contends "take money from the pockets of plaintiffs solely to deposit it in the pockets of attorneys." Rather, as the dissent points out, it "takes money from a defendant that has practiced discrimination against one of its employees, and it gives plaintiffs such as Sheppard the confidence of knowing that they will be able to pay their attorney's fees even if their case evolves into one of mixed motive." App. 4a n. 9.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant her petition for Writ of Certiorari in order to address this important issue. If allowed to stand, the Fourth Circuit's decision will have a far-reaching, deleterious and chilling effect on the enforcement of the employment discrimination laws and thwart the clear intent of Congress.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 29, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 29, 1996

No. 95-1091
CA-93-2663-S

THERESA L. SHEPPARD

Plaintiff-Appellee

v.

RIVERVIEW NURSING CENTER, INCORPORATED

Defendant-Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing En Banc

Appellee filed a petition for rehearing with suggestion for rehearing en banc.

Chief Judge Wilkinson and Judge Williams voted to deny reheating. Judge Michael voted to grant rehearing.

Appendix A

A member of the Court requested a poll on the suggestion for rehearing en banc, and a majority of the judges voted to deny rehearing en banc. Judges Hall, Murnaghan, Ervin, Michael, and Motz voted to rehear the case en banc. Chief Judge Wilkinson and Judges Russell, Widener, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted against rehearing en banc.

The Court denies the petition for rehearing with suggestion for rehearing en banc.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court,

s/ Bert M. Montague
Bert M. Montague
CLERK

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 27, 1996

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-1091

THERESA L. SHEPPARD,

Plaintiff-Appellee,

v.

RIVERVIEW NURSING CENTER, INCORPORATED,

Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-93-2663-S)

Argued: March 7, 1996

Decided: June 27, 1996

Appendix B

Before WILKINSON, Chief Judge, and WILLIAMS and MICHAEL, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judge Williams joined. Judge Michael wrote a dissenting opinion.

COUNSEL

ARGUED: Frank S. Astroth, ASTROTH, SEROTTE, ROCKMAN & WESCOTT, Baltimore, Maryland, for Appellant. Bradford W. Warbasse, Donald N. Rothman, GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER, Baltimore, Maryland, for Appellee. Karen Marie Moran, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Jeffrey Rockman, ASTROTH, SEROTTE, ROCKMAN & WESCOTT, Baltimore, Maryland, for Appellant. James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

OPINION

WILKINSON, Chief Judge:

This appeal requires us to examine the district court's award of attorney's fees in a mixed-motive employment discrimination case. Appellee Theresa L. Sheppard prevailed in a mixed-motive claim against appellant Riverview Nursing

Center ("Riverview"), but Riverview established that it would have reached the same decision even absent any discrimination. In such cases, he Civil Rights Act of 1991 provides that a court "may" grant attorney's fees. 42 U.S.C. § 2000e-5(g)(2)(B).

The district court granted Sheppard declaratory relief, costs of $167.02, and attorney's fees in the amount of $40,000. Riverview appeals the fee award. Because the district court failed to appreciate its full discretion under the statute regarding whether to grant attorney's fees, and because we believe that certain concerns of proportionality should inform that inquiry, we remand for reconsideration of the fee award.

I.

In September 1993, Sheppard filed a gender discrimination claim against Riverview under Title VII, alleging that she was laid off because of her pregnancy. 42 U.S.C. § 2000e(k). Five weeks after initiation of the suit, Riverview tendered a $5,000 settlement offer, which Sheppard rejected. A jury trial was held beginning on October 31, 1994.

Following trial, the district court instructed the jury in accordance with the standards applicable to mixed-motive claims under the Civil Rights Act of 1991.[1] The jury was asked to determine whether Sheppard's pregnancy was a "motivating factor" in the decision to lay her off. 42 U.S.C. § 2000e-2(m). The court then asked the jury to decide whether, even if discrimination had been a motivating factor, Riverview would

---

1. Whether this case was properly submitted to the jury as a mixed-motive case is not at issue in this appeal. *See Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995).

have discharged Sheppard in any case for nondiscriminatory reasons. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

The jury answered both questions in the affirmative, determining that discrimination had motivated Riverview's decision, but that Sheppard would have been laid off for legitimate reasons. Before the Civil Rights Act of 1991, such a finding would have insulated Riverview from liability. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). After the Act, however, a plaintiff is eligible for limited recovery in such situations — declaratory relief, certain types of injunctive relief, and attorney's fees and costs — as is provided for in 42 U.S.C. § 2000e-5(g)(2)(B):

> On a claim which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, thecourt —
>
> (i) may grant declaratory relief, injunctive relief (except asprovided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Pursuant to these provisions, the district court awarded Sheppard a declaratory judgment, but denied injunctive relief because it found insufficient danger of a continuing violation.

Sheppard then filed a motion requesting attorney's fees of $40,000 and costs of $4,509.74.[2] Riverview challenged the fee request, arguing that under *Farrar v. Hobby*, 506 U.S. 103 (1992), a civil rights plaintiff who prevails as a technical matter but who receives only nominal damages should not recover any attorney's fees. The district court disagreed, reasoning that *Farrar* was based on 42 U.S.C. § 1988, whereas Sheppard's request arose from 42 U.S.C. § 2000e-5(g)(2)(B). The latter provision already limits the types of available relief, the court concluded. As a result, hinging the recovery of attorney's fees on the degree to which plaintiffs secure relief would, in the court's view, effectively nullify the availability of fees.

Riverview also challenged the fee award under Rule 68 of the Federal Rules of Civil Procedure, which requires a plaintiff who rejects a settlement offer to py her own post-offer "costs" if the offer turns out to be more favorable than her eventual recovery. Riverview asserted that its settlement offer of $5,000 exceeded Sheppard's recovery, and that the $40,000 attorney's fee award thus should be reduced by the amount of fees attributable to post-offer services. The district court disagreed, ruling that under the language of 42 U.S.C. § 2000e-5(g)(2)(B), attorney's fees are not part of the post-offer "costs"

---

2. Sheppard actually claimed to have incurred attorney's fees in the amount of $80,899.50, but she voluntarily reduced her fee request to $40,000 because of her failure to prove that she would not have been laid off absent any discrimination.

subject to Rule 68. *Marek v. Chesny*, 473 U.S. 1 (1985). The court did, however, reduce Sheppard's recovery of costs from $4,509.74 to $167.02 pursuant to Rule 68. Riverview appeals the $40,000 fee award.

II.

The district court apparently believed that an award of attorney's fees was mandatory in mixed-motive cases, and that *Farrar v. Hobby*'s concerns with the relationship between the fees and the degree of success achieved in the underlying litigation had no application here. To the contrary, we believe that the award of fees is discretionary under 42 U.S.C. § 2000e-5(g)(2)(B), and that concerns of proportionality do play a part in the analysis.

A.

The statute under which the attorney's fees were awarded in this case, 42 U.S.C. § 2000e-5(g)(2)(B), provides that a court "may" grant attorney's fees. The word "may" means just what it says: that a court has discretion to award (or not to award) attorney's fees. The terms of § 2000e-5(g)(2)(B) make evident that the granting of fees is discretionary rather than mandatory — the provision later states that a court "shall" not award damages or require reinstatement. Plainly, if Congress had wished to require recovery of attorney's fees, it would have provided that court "shall" grant fees instead of that they "may" do so. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir.) ("When Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."), *cert. denied*, 469 U.S. 881 (1984).

Here, the district court appeared to misperceive the discretionary nature of its inquiry, assuming instead that an award of attorney's fees was essentially mandatory. Its analysis of Sheppard's motion for attorney's fees dealt primarily with whether the amount of fees requested was reasonable, not with whether fees should be granted in the first instance. In the court's view, a "wholesale denial of fees . . . is completely unjustified and flies in the face of the statute making such fees available." *Sheppard v. Riverview Nursing Centre*, 870 F. Supp. 1369, 1381 (D. Md. 1994). But a denial of fees only "flies in the face" of a statute that *requires* courts to award fees, not a statute, like § 2000e-5(g)(2)(B), that leaves the determination to a court's discretion. By its nature, the latter sort of provision contemplates that courts may decide not to grant fees in particular cases.

The decision whether to award fees under § 2000e-5(g)(2)(B) is thus plainly a discretionary one. We turn now to an examination of the considerations that should inform a court's exercise of that discretion.

B.

In *Farrar v. Hobby*, 506 U.S. at 103, the Supreme Court discussed the factors that should guide a court's determination of whether to award attorney's fees. In that case, Dale Farrar sought $17 million in damages in a § 1983 action, but ultimately received only one dollar as a nominal award. The district court nevertheless granted him $280,000 in attorney's fees under 42 U.S.C. § 1988, which states that a court "may" in its discretion award to a "prevailing party" in a civil rights action a "reasonable attorney's fee." The Supreme Court held that Farrar qualified as a "prevailing party" so as to be eligible for

attorney's fees, but that considerations of proportionality should guide the decision whether to award fees. Given the minimal success achieved by Farrar, the Court found, the appropriate fee recovery in the circumstances was "no fee at all." *Farrar*, 506 U.S. at 115.

The same logic should bar recovery of attorney's fees here, Riverview asserts, because Sheppard only obtained declaratory relief. The district court rejected this argument on the ground that *Farrar* construed 42 U.S.C. § 1988, whereas in this case the fee award arises under 42 U.S.C. § 2000e-5(g)(2)(B).[3] In our view, however, any difference between the two provisions does not justify disregarding *Farrar*. It is true that *Farrar* examined whether a plaintiff who receives only nominal damages qualifies as a "prevailing party" under § 1988, and that § 2000e-5(g)(2)(B) contains no prevailing party requirement. But the Court's discussion of the prevailing party threshold was only one of the decision' two principal elements, dealing solely with whether a particular plaintiff was *eligible* to receive fees. *Farrar* also addressed a second issue, one that lies at the heart of this case: Assuming that a given plaintiff is eligible to receive attorney's fees, what factors should inform a district court's exercise of its statutory discretion in deciding whether to award

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3. We reject Riverview's suggestion that either 42 U.S.C. § 1988 or 42 U.S.C. § 2000e-5(k) governs the analysis of attorney's fees in this case. Both provisions generally allow for attorney's fees for plaintiffs who prevail in civil rights lawsuits, the latter dealing with Title VII and the former with a broader range of actions. As the district court correctly found, 42 U.S.C. § 2000e-5(g)(2)(B) controls the award of attorney's fees here, because that provision is a more specific one applying uniquely in the context of mixed-motive cases. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned.").

fees? With respect to that question, sections 1988 and 2000e-5(g)(2)(B) require similar inquiries.

When assessing whether to grant fees, *Farrar* requires that courts consider the relationship between the fees and the degree of the plaintiff's success. *Farrar*, 506 U.S. at 114-16. The district court seemed to be of the view that, because § 2000e-5(g)(2)(B) already limits the scope of recovery, *Farrar*'s concern with proportionality makes little sense in this context: "Denying recovery of attorney's fees in this situation on the rationale of 'lack of success' would render the statute ineffective and practically meaningless." *Sheppard*, 870 F. Supp. at 1381. Section 2000e-5(g)(2)(B) does prohibit any recovery of damages, and so we agree with the trial court that simply comparing the extent of damage recovery with the attorney's fees would amount to an empty exercise. Nevertheless, if denial of fees would invariably render the statute "ineffective" and "practically meaningless," Congress would have written a mandatory provision requiring that attorney's fees be awarded in every case. That it did not do so suggests that Congress was wary of enacting legislation whose benefit inures primarily to lawyers in the form of a substantial fee recovery, even if relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals.

Factoring proportionality concerns into the analysis helps guard against this result. In appropriate cases, for instance, courts should consider the reasons why injunctive relief was or was not granted, or the extent and nature of any declaratory relief. Moreover, *Farrar*'s concern was not only with whether the extent of recovery accords with the amount of attorney's fees. The decision suggested a more general proportionality consideration as well: whether the public purposes served by

resolving the dispute justifies the recovery of fees. *See Farrar*, 506 U.S. at 121-22. (O'Connor, J., concurring) (a plaintiff's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client").

Such an analysis should apply here. By definition, an illicit factor will have played some role in cases subject to § 2000e-5(g)(2)(B). *See* 42 U.S.C. § 2000e-2(m). But within that category of cases, there are large differences. Some mixed-motive cases will evidence a widespread or intolerable animus on the part of a defendant; others will illustrate primarily the plaintiff's unacceptable conduct which, by definition, will have justified the action taken by the defendant. The statute allows district courts to distinguish among cases that are in reality quite different.

Factoring *Farrar*'s principles into the analysis under § 2000e-5(g)(2)(B) will not suppress the incentive to file Title VII actions. A host of contingencies affects the course of every civil rights lawsuit. There is always the risk that a plaintiff will not prevail on the merits, yet this is not a disincentive to the initiation of Title VII actions. Moreover, because a case generally does not become a mixed-motive or pretext case until after the evidence is developed, *see Fuller v. Phipps*, 67 F.3d 1137, 1142-43 (4th Cir. 1995), plaintiffs ordinarily will not know whether their claim implicates § 2000e-5(g)(2)(B) at the time of filing suit. And in cases governed by § 2000e-5(g)(2)(B), an award of attorney's fees will often be appropriate for the reasons we have already expressed.

Appendix B

III.

Riverview contends that under Fed. R. Civ. P. 68, Sheppard should be forced to bear the cost of attorney's fees that accrued after the date of the $5,000 offer of judgment. We disagree that Rule 68 applies of its own force to the award of attorney's fees in § 2000e-5(g)(2)(B) cases. We do believe, however, that a court may consider a plaintiff's rejection of a settlement offer as one of several factors generally informing its discretionary inquiry under § 2000e-5(g)(2)(B).

Rule 68 states that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the *costs* incurred after the making of the offer."[4] Fed. R. Civ. P. 68 (emphasis added). Whether attorney's fees fall within the category of "costs" subject to Rule 68's cost-shifting requirement depends upon the precise language of the statute providing for the fee award. *Marek v. Chesny*, 473 U.S. 1, 9 (1985). *Marek* involved 42 U.S.C. § 1988, which allows courts to award "attorney's fees *as part of the costs*." 42 U.S.C. § 1988(b) (emphasis added). The Supreme Court held that the language of § 1988 plainly contemplates that "costs" include attorney's fees, and so fees recovered pursuant to that

4. In this case, "the judgment finally obtained" by Sheppard was "not more favorable than" the $5,000 offer. Fed. R. Civ. P. 68. The $5,000 offer included damages as well as fees and costs then accrued. The relevant comparison is thus with the damages actually awarded plus that portion of the fees and costs actually awarded that is attributable to the period preceding the offer. *See Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993). Here, Sheppard received no damages, and the portion of the fees and costs awarded relating to the period preceding the offer was calculated by the district court to be $3,509.32. Because this figure is less than the $5,000 offer, Rule 68 would require that Sheppard pay for her own post-offer "costs." The question we address here is whether attorney's fees are part of these "costs."

statute are subject to Rule 68's cost-shifting requirement. *Marek*, 473 U.S. at 9.

The award of attorney's fees in this case, however, was pursuant to § 2000e-5(g)(2)(B), which provides for the recovery of "attorney's fees *and costs*." 42 U.S.C. § 2000e-5(g)(2)(B)(i) (emphasis added). In expressly distinguishing attorney's fees from "costs," Congress was aware that it was deviating from the language in § 1988, and that under Marek, the Rule 68 implications depend upon the precise wording of the fee-enabling statute. *See* H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 82 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 620. This explicit congressional recognition, coupled with *Marek*'s emphasis on the exact language of the particular attorney's fee provision, makes clear that fees granted under § 2000e-5(g)(2)(B) are not part of "costs" subject to Rule 68.

That Rule 68 may not require plaintiffs to bear their own post-offer attorney's fees in § 2000e-5(g)(2)(B) cases does not, however, prohibit courts from considering a plaintiff's rejection of a settlement offer as one factor affecting its decision whether to award fees or in what amount. In fact, such a consideration seems a sensible one in light of *Farrar's* concerns with the degree of success achieved by the plaintiff and the public purposes served by the litigation. *See Marek*, 473 U.S. at 11. After all, refusing a reasonable offer of settlement promotes few public interests when the plaintiff ultimately receives a less favorable recovery after trial. Consequently, courts may consider a plaintiff's refusal of a settlement offer as one of several proportionality factors guiding their exercise of discretion under § 2000e-5(g)(2)(B), and the district court may do so here on remand.

Appendix B

IV.

Our good colleague on this panel has written a fine dissenting opinion. We shall explain briefly why we disagree with it.

The dissent contends essentially that district courts must award a lodestar attorney's fee in all cases subject to § 2000e-5(g)(2)(b), "even when 'special circumstances' exist that would render a grant of fees 'unjust.' " *Infra* at 18. This conclusion cannot be squared with the statutory language. Congress, as we have discussed, wrote that a district court "may" grant attorney's fees. It did not write that fees "shall" or "must" be awarded in every mixed-motive case, and we are not at liberty to place in its mouth words which are not there. Any difference in language between § 1988 and § 2000e-5(g)(2)(B) is outweighed by their matching dispositive verb, "may," which signifies that district courts retain discretion under both provisions. *See Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1033 (1994); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 (1978).

The dissent suggests, however, that "may" and "shall" can be synonymous. *Infra* at n.2. Even young children would say otherwise. They learn early on that "may" is a wonderfully permissive word. "Shall," by contrast, is more sternly mandatory. And whatever the merits of believing "may" means "shall," they do not apply when Congress has employed the two different verbs in neighboring statutory passages. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("when the same Rule uses both 'may' and 'shall,' the normal inference is

that each is used in its usual sense — the one act being permissive, the other mandatory").[5]

Alternatively, the dissent maintains, "may" only operates to show that district courts are under no obligation to grant injunctive relief under the statute. This suggestion, too, is disproved by the statutory language. The word "may" qualifies the award of all forms of relief, not just injunctive relief: According to § 2000e-5(g)(2)(B), a district court "may grant declaratory relief, injunctive relief . . . and attorney's fees and costs." So if "may" gives district courts discretion on whether to award an injunctive remedy, it must do the same with regard to attorney's fees as well.

The dissent's spin on the statute, moreover, entails an anomalous outcome: It places mixed-mtive plaintiffs in a more favorable position than plaintiffs for whom discrimination is the sole cause of an adverse employment decision. In cases falling under § 2000e-5(g)(2)(B), the employer by definition "would have taken the same action in the absence of [any] impermissible motivating factor" —here, the jury made that very finding on its verdict form. Suppose that a plaintiff was discharged for embezzling funds, divulging company secrets, or acting abusively toward his or her co-workers, but that an illicit factor also played some role in the dismissal. Such a plaintiff would automatically recover attorney's fees under the dissent's view of § 2000e-5(g)(2)(B). A plaintiff who engaged in no misconduct, by contrast, would

5. Contrary to the dissent's implication, the Supreme Court did not suggest otherwise in *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995). That opinion states that " 'shall' generally means 'must,' " but that "legal writers sometimes use, or *misuse* 'shall' to mean 'should,' 'will,' or even 'may.' " *Id.* at 2235 n. 9 (emphasis added).

find any recovery of fees subject to *Farrar's* proportionality standards. This could not have been Congress' intention.

The dissent confuses eligibility for attorney's fees with an entitlement to a lodestar award. The premise seemingly underlying the dissent's interpretation of the statute is that, because mixed-motive plaintiffs are barred from receiving an award of money damages, they are entitled on that account to a grant of attorney's fees. There is no indication in the statute, however, that Congress sought to take money from the pockets of plaintiffs solely to deposit it in the pockets of attorneys. Of course, § 2000e-5(g)(2)(B)'s express prohibition against any award of damages does affect the proportionality inquiry — we agree with the dissent that a plaintiff's "lack of success in obtaining a money judgment cannot . . . preclude an award of attorney's fees," *infra* at 23, and we state so above. Just as plaintiffs should often receive attorney's fees when they prevail in non-mixed-motive cases, *see Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), they will often recover fees when they prevail in mixed-motive cases as well, despite the unavailability of damages.

This does not mean, however, that § 2000e-5(g)(2)(B) completely strips district courts of their traditional discretion to tailor the fee award to the plaintiff's degree of success. *See Hensley*, 461 U.S. at 434-37. So while we heartily agree with the principle that the "work-place is no place for discrimination," *infra* at 27, we simply believe that district courts may consider the circumstances of each case in fashioning any award of attorney's fees — indeed, one of the relevant factors is the extent to which a plaintiff succeeds in showing that an employer's discrimination, and not the employee's own misconduct, drove the employment decision.

In short, district courts retain discretion in awarding attorney's fees under § 2000e-5(g)(2)(B), just as they have discretion under other civil rights fee statutes, but with *Farrar's* proportionality considerations modified to fit the parameters of § 2000e-5(g)(2)(B) along the lines we have outlined.

V.

Farrar was designed to prevent a situation in which a client receives a pyrrhic victory and the lawyers take a pot of gold.[6] The district court in this case awarded $40,000 in attorney's fees under the impression that it lacked the discretion customarily accorded trial courts in the area of attorney's fees. For the foregoing reasons, we vacate the award and remand the case, so that the district court may reconsider it, describing its application of the factors set forth herein.

VACATED AND REMANDED

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6. The district court echoed this very concern in quite humorous fashion, stating at the conclusion of its opinion:

> On my office wall, there hangs a nineteenth century English print entitled *The Lawsuit*, showing two farmers fighting over a stationary cow — one pulling her by the horns and the other by the tail — while a bewigged barrister happily milks her. This case certainly demonstrates that nothing much has changed. The plaintiff and the defendant are right where they started, while the lawyers' pail hold all the milk.

Sheppard, 870 F. Supp. at 1384.

Appendix B

MICHAEL, Circuit Judge, dissenting:

I respectfully dissent because the majority opinion completely frustrates the intent of Congress. Prior to the passage of the Civil Rights Act of 1991, an employer was immune from liability under Title VII in "mixed-motive" cases. That is, in cases where the plaintiff showed that an impermissible factor such as race or gender played a motivating role in an employment decision, the employer could still avoid liability by showing that it would have made the same employment decision in the absence of the impermissible factor. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 244-45 (1989). Accordingly, a plaintiff in a mixed-motive case was the loser and not eligible for an award of attorney's fees.

However, with the passage of the Civil Rights Act of 1991, Congress decided that a plaintiff in a mixed-motive case can in fact establish a violation of Title VII. In particular, 42 U.S.C. § 2000e-2(m), section 703(m) of the Civil Rights Act of 1991, provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

According to Congress, therefore, a plaintiff who proves a mixed-motive employment decision succeeds in winning her case.

Yet, with her "win," a plaintiff is only eligible for limited relief:

> On a claim in which an individual proves a violation under section 2000e-2(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —
>
> (i) *may grant* declaratory relief, injunctive relief (except as provided in clause (ii)), *and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m)*; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B), section 706(g) of the Civil Rights Act of 1991 (emphasis added). Thus, again according to Congress, a court in a mixed-motive case "may grant" the plaintiff an award of "attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m)." Congress made equally clear, however, that a plaintiff cannot recover money damages, and she may be granted injunctive relief only to the extent that such relief does not conflict with subsection 5(g)(2)(B)(ii).

In this appeal, two questions are raised by a plain reading of section 2000e-5(g)(2)(B). First, under what circumstances

"may" a court "grant" an award of attorney's fees when the plaintiff has successfully established a violation of section 2000e-2(m)? And second, if an award of attorney's fees is granted, what amount should be awarded?

In answering these questions the majority simply misreads both section 2000e-5(g)(2)(B) and the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). In particular, the majority holds that the proportionality considerations that informed the *Farrar* Court's decision to deny fees under 42 U.S.C. § 1988 should also apply in determining whether to grant or deny fees under section 2000e-5(g)(2)(B). *Ante* at 6-8. That conclusion effectively writes section 2000e-5(g)(2)(B) out of exstence: after today, to recover attorney's fees a plaintiff must show more than a violation of section 2000e-2(m) and achieve some level of success beyond what Congress intended. The majority reaches this result even though *Farrar* involves a statutory provision different than section 2000e-5(g)(2)(B), and even though a plaintiff in a mixed-motive case is expressly precluded from recovering money damages and her right to injunctive relief is severely limited. The majority's interpretation of section 2000e-5(g)(2)(B) is not supportable as a matter of statutory construction. Nor is it reasonable.

I.

The Supreme Court's decision in *Farrar v. Hobby* does not have any bearing on whether and to what extent a court should grant an award of attorney's fees under section 2000e-5(g)(2)(B). And, even if *Farrar* were applicable in mixed-motive cases, that decision would support the conclusion that an award of attorney's fees should be granted under almost all circumstances in which a plaintiff establishes a violation of section 2000e-2(m).

Appendix B

A.

In *Farrar* the Court was asked to decide whether a plaintiff who recovers only nominal damages may still be deemed a prevailing party eligible for an award of attorney's fees. The statute at issue there was the Civil Rights Attorney's Fees Awards Act of 1976, as amended, 42 U.S.C. § 1988, which provides that:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d, et seq.], or section 13981 of this title, *the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

(Emphasis added.) After determining that a party who "wins" her case yet recovers only noinal damages is in fact a "prevailing party" under section 1988, *Farrar*, 506 U.S. at 112-14, the Court nonetheless held that under such circumstances "the only reasonable fee is usually no fee at all." *Id.* at 115.

In this case, however, we are asked to interpret section 2000e-5(g)(2)(B), not section 1988. On their faces these sections are quite different. Section 1988 makes clear that "the court, *in its discretion*, may allow the prevailing party . . . *reasonable* attorney's fees as part of costs." (Emphasis

added.) Likewise, section 2000e-5(k), the general provision under which a Title VII plaintiff recovers attorney's fees, provides that "the court, *in its discretion*, may allow the prevailing party . . . *reasonable* attorney's fees . . . as part of costs." (Emphasis added.)[1] By contrast, section 2000e-5(g)(2)(B) does not provide for the court to award "reasonable" attorney's fees "in its discretion." Of course, section 2000e-5(g)(2)(B) contains the word "may," and we usually assume that Congress's use of "may" instead of "shall" indicates that the court has discretion to act. But when, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Thus, when the statutory language of section 2000e-5(g)(2)(B) is contrasted with the language of section 1988 and section 2000e-5(k) — that is, when one appreciates that Congress omitted both the "in its discretion" and "reasonable" language from section 2000e-5(g)(2)(B) — it is clear that Congress intended that a court have less discretion to deny attorney's fees under section 2000e-5(g)(2)(B) than it

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1. The majority makes no claim that either section 1988 or section 2000e-5(k) controls here and in fact rejects the proposition altogether, *ante* at 6 n.3, though the appellant's principal argument on appeal was that section 1988 controlled or, in the alternative, that section 2000e-5(k) controlled. *See* Appellant's Br. at 12-13 ("Riverview contests the District Court's finding that § 2000e-5(g)(2)(B) governs with respect to determining an award of attorney's fees in this case. . . . [T]he applicable statute to be considered with her request for attorney's fees is the Civil Rights Attorney's Fees Award Act of 1976, § 1988. . . . Alternatively, the appropriate attorney's fees provision . . . [is] in Title VII . . . at § 2000e-5(k) . . . .").

possesses under section 1988 and section 2000e-5(k). Although section 1988 is not part of Title VII, both section 1988 and section 2000e-5(g)(2)(B) involve the same subject: the grant of attorney's fees. Also, section 2000e-5(k) is in Title VII, and in fact, it is part of the same statutory section as section 2000e-5(g)(2)(B) (*i.e.*, section 2000e-5), following just four paragraphs after section 2000e-5(g)(2)(B). It is therefore evident that Congress intended to leave out the "in its discretion" and "reasonable" language from section 2000e-5(g)(2)(B). *See ante* at 5 ("When Congress uses explicit language in one part of the same statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.") (quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir.), *cert. denied* 469 U.S. 881 (1984)). To read (as does the majority) section 2000e-5(g)(2)(B) to require the same analysis as the Court employed in Farrar means either that the "in its discretion" and "reasonable" language of section 1988 and section 2000e-5(k) is superfluous or that we can infer from the statutory silence of section 2000e-5(g)(2)(B) a level of discretion that does not expressly exist. As a matter of basic statutory construction, I can not accept either of these propositions. Nor did Congress.

Moreover, Congress's use of the phrase "shall not" in subsection (ii) of section 2000e-5(g)(2)(B) does not, as the majority urges, show that Congress, in using the word "may" in subsection (i), intended a court to have the same discretion under section 2000e-5(g)(2)(B) as it does under section 1988 and section 2000e-5(k). *See ante* at 5-6. For one thing, if Congress had used the phrase "may not" in subsection (ii), the court's discretion under that subsection would be just as limited (*i.e.*, none at all). Also, because in most instances the statutory

language of section 2000e-5(g)(2)(B) precludes a grant of injunctive relief in a mixed-motive case, Congress's use of the word "may" likely reflects the fact that a court will be unable to grant injunctive relief, not that a court has the same discretion to grant (or deny) attorney's fees under section 2000e-5(g)(2)(B) as it does under section 1988 and section 2000e-5(k). In this case, for example, Sheppard did not qualify for the limited form of injunctive relief authorized under section 2000e-5(g)(2)(B) because, as the district court recognized, there is "no danger of a continuing violation of the plaintiff's right to be free from illegal discrimination." *Sheppard v. Riverview Nursing Centre, Inc.*, 870 F. Supp. 1369, 1374 (D. Md. 1994).[2]

In light of the (pre-*Farrar*) case law existing at the time Congress enacted section 2000e-5(g)(2)(B), Congress's

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2. Although I do not rely on it, there is certainly an argument that Congress intended the word "may" to mean "shall" in the context of an award of attorney's fees under section 2000e-5(g)(2)(B). As the Supreme Court recognizes, Congress does occasionally use the words "shall" and "may" interchangeably. *See Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2235 n.9 (1995) (" 'shall' and " 'may' " are 'frequently treated as synonyms' and their meaning depends on context") (quoting D. Mellinkoff, *Mellinkoff's Dictionary of American Usage* 402-03 (1992)); *id.* ("[C]ourts in virtually every English-speaking jurisdiction have held — by necessity — that *shall* may mean *may* in some contexts, and vice versa.") (quoting B. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995)). *See also id.*, 115 S. Ct. at 2239 (Souter, J., dissenting) ("Providing authority in one circumstance but not another implies an absence of authority in the statute's silence."). Thus, while the majority says that young children consider "may" "a wonderfully permissive word," *ante* at 10-11, "[e]ven young children" (to borrow the majority's phrase) recognize the importance of context. Surely, a misbehaving young child understands the meaning of the parental instruction "You may go to your room now!".

probable intent was that a court should grant attorney's fees under almost all circumstances in which a plaintiff establishes a violation of section 2000e-2(m). WhenCongress enacted section 2000e-5(g)(2)(B) in 1991, the Supreme Court had recognized on several occasions that:

> [S]ection [1988] states that the court "*in its discretion*" may allow a fee, but that discretion is not without limit: the prevailing party "*should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.*"

Blanchard v. Brgerson, 489 U.S. 87, 89 n.1 (1989) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)) (emphasis added). Therefore, the conclusion to draw from Congress's decision not to include the "in its discretion" and "reasonable" language in section 2000e-5(g)(2)(B) is that a court should grant attorney's fees under section 2000e-5(g)(2)(B) even when "special circumstances" exist that would render a grant of fees "unjust" under section 1988 (or section 2000e-5(k)).

The particular "special circumstance" that Congress evidently intended to exclude from a court's consideration when it enacted section 2000e-5(g)(2)(B) is the situation where a plaintiff recovers no money damages. Justice O'Connor's concurring opinion in *Farrar* confirms this because she makes clear that under *Hensley v. Eckerhart* the award of nominal damages is a "special circumstance" making "unjust" the award of any "reasonable" attorney's fee under section 1988:

> It goes without saying that, if the *de minimis* exclusion were to prevent the plaintiff from

> obtaining prevailing party status, fees would be denied. [*Farrar*, 506 U.S.] at 116. And if the *de minimis* victory exclusion is in fact part of the reasonableness inquiry, see [*id.*] at 114, summary denial of fees is still appropriate. We have explained that even the prevailing plaintiff may be denied fees if " 'special circumstances would render [the] award unjust.' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). While that exception to fee awards has often been articulated separately from the reasonableness inquiry, sometimes it is bound up with reasonableness: It serves as a short-hand way of saying that, even before calculating a lodestar or wading through all the reasonableness factors, it is clear that the reasonable fee is no fee at all. After all, where *the only* reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust, the reasonable fee is no fee at all.

Farrar, 506 U.S. at 118 (O'Connor, J., concurring) (emphasis in original). Under section 2000e-5(g)(2)(B), however, there is no "reasonableness inquiry" to make because the word "reasonable" is not found. There are, therefore, no "proportionality" considerations to take into account when deciding whether to grant attorney's fees.[3]

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3. I am not suggesting that Congress authorized in section 2000e-5(g)(2)(B) the grant of an unreasonable attorney's fee. Rather, Congress has itself determined that a reasonable fee is that "directly attributable only to the

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Justice O'Connor also makes clear that if Congress had declared a contrary intent in section 1988, a court would still be required to grant a fee when only nominal damages are awarded:

> Of course, no matter how much sense this approach makes, it would be wholly inappropriate to adopt if Congress had declared a contrary intent. When construing a statute, this Court is bound by the choices Congress has made, not the choices we might wish it had made. . . . Section 1988 expressly grants district courts discretion to withhold attorney's fees from prevailing parties in appropriate circumstances: It states that a court "may" award fees "in its discretion." 42 U.S.C. § 1988. . . . [T]he occurrence of a purely technical or *de minimis* victory is such a circumstance. Chimerical accomplishments are simply not

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pursuit of a claim under section 2000e-2(m)." *See infra* Part II. And, despite what the majority believes, I am also not suggesting that district courts must award a lodestar attorney's fee in all cases subject to section 2000e-5(g)(2)(B). *See ante* at 10. Nor am I confusing "eligibility for attorney's fees with an entitlement to a lodestar award." *Id.* at 11. Although the absence of the word "reasonable" in the statutory language of section 2000e-5(g)(2)(B) compels the conclusion that the proportionality considerations of *Farrar* do not apply in a mixed-motive case, "special circumstances" might still exist rendering any award of fees unjust. *See infra* at 22 n.5. That analysis does not confuse eligibility with entitlement. It merely recognizes that the particular "reasonableness inquiry" that Justice O'Connor outlines in *Farrar* does not have a role under section 2000e-5(g)(2)(B) in answering the questions of whether an award of fees may be granted and, if so, in what amount.

> the kind of legal change that Congress sought to promote in the fee statute.

Farrar, 506 U.S. at 118-19 (O'Connor, J., concurring) (citations omitted).

Of course, in the light of the statutory language contained in section 2000e-5(g)(2)(B), no matter how much sense the majority's approach might make here, it is wholly inappropriate because Congress has declared a contrary intent. The exclusion of the "in its discretion" and "reasonable" language shows that a court should still grant attorney's fees when a successful mixed-motive plaintiff recovers no money damages or obtains no injunctive relief. This only makes sense because section 2000e-5(g)(2)(B) expressly precludes a plaintiff from recovering money damages and severely limits a plaintiff's right to injunctive relief. Indeed, in the context of mixed-motive cases, Congress has decided that even though a plaintiff's remediesare severely limited, there is nothing "technical," "*de minimis*," or "chimerical" when a plaintiff establishes liability. This is the case because there is nothing "technical," "*de minimis*," or "chimerical" about exposing discrimination in the workplace.

In sum, if Congress had meant for a plaintiff's proportional degree of success, over and above establishing a violation of section 2000e-2(m), to dictate whether a grant of attorney's fees is proper, Congress would surely have made this plain, instead of simply authorizing a grant of attorney's fees whenever a violation of section 2000e-2(m) is established. It is therefore plain that section 2000e-5(g)(2)(B) eliminates from a court's discretion the issue of proportionality (*i.e.*, the "reasonableness inquiry"), which lies at the heart of *Farrar*. To hold otherwise

(as the majority does) renders meaningless Congress's decision to allow for attorney's fees in mixed-motive cases because remedies are limited and monetary damages precluded.[4]

I turn then to the first of the two questions raised by a plain reading of section 2000e-5(g)(2)(B): under what circumstances "may" a court "grant" an award of attorney's fees when the plaintiff has successfullyestablished a violation of section 2000e-2(m). That question has aclear answer. Once a plaintiff proves a violation under section § 2000e-2(m), Congress intended that a court should grant attorney's fees under almost all circumstances, and without regard to a plaintiff's proportional degree of success. There could be no other purpose for Congress providing for the award of "reasonable" attorney's fees in the court's "discretion" under section 1988 and section 2000e-5(k), but not including the "in its discretion" and "reasonable" language in section 2000e-5(g)(2)(B). In light of the express statutory language of section 2000e-5(g)(2)(B), *Farrar v. Hobby* does not block what Congress intended to achieve by awarding attorney's fees to those who expose discrimination by proving mixed-motive employmentdecisions.[5]

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4. The majority's holding is especially ironic because the majority makes clear that "we are not at liberty to place in [Congress's] mouth words which are not there." *See ante* at 10. Yet, by reading the "in its discretion" and "reasonable" language into section 2000e-5(g)(2)(B), it is the majority that has done just that.

5. As for "special circumstances" that a court "may" still consider under section 2000e-5(g)(2)(B), they are few. *See, e.g., Hatfield v. Hayes*, 877 F.2d 717, 720 (8th Cir. 1989) ("special circumstances" exception is judicially created and should be narrowly construed); *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985) (en banc) ("Defendants' good faith, lack of

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Appendix B

B.

Suppose I am wrong to conclude that the Supreme Court's decision in *Farrar v. Hobby* has nothing to do with a court's consideration of whether to grant attorney's fees under section 2000e-5(g)(2)(B). Even still, under a proper application of *Farrar* a court should grant attorney's fees whenever a plaintiff has successfully established a violation of section

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culpability, or prompt remedial action do not warrant a denial of fees under the special circumstances preclusion.") (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.4 (1968) (per curiam); *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982) (that an action provided a private benefit to a plaintiff rather than a public benefit to a class of similarly situated persons is not a special circumstance to deny § 1988 attorney's fees); *Staten v. Housing Auth.*, 638 F.2d 599 (3d Cir. 1980) (that the case was "simple" or could be "routinely handled" does not justify denial of § 1988 attorney's fees); *Love v. Mayor, City of Cheyenne*, 620 F.2d 235 (10th Cir. 1980) (defendant's good faith is not a special circumstance justifying the denial of attorney's fees under § 1988). We have previously said that under section 1988 a district court may deny a request for attorney's fees in its entirety when the amount requested by the prevailing party is so outrageously excessive as to shock the conscience of the court. *Fair Housing Council v. Landow*, 999 F.2d 92, 97-98 (4th Cir. 1993) (establishing guidelines that an applicant must meet before the district court may grant an award of fees). And the Supreme Court has said that a court has discretion to deny fees when the request has not been timely made. *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 (1982) ("Section 1988 authorizes the award of attorney's fees 'in [the] discretion' of the court. We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party."). In this case, Riverview concedes that Sheppard made a timely motion for attorney's fees and that she voluntarily reduced the amount requested by fifty percent. *See* Appellant's Br. at 8. I would therefore hold that there are no "special circumstances" presented here.

2000e-2(m) and obtained either declaratory or some limited form of injunctive relief. Thus, under *Farrar* the answer to the first question posed above remains the same because it will only be under the most unusual circumstances that a plaintiff will not be awarded either of these remedies.

To be eligible to recover attorney's fees under section 1988 (the statute at issue in *Farrar*) a party must be the "prevailing party." In *Farrar* the Supreme Court first held that a plaintiff who recovers only nominal damages is in fact a prevailing party for purposes of section 1988. 506 U.S. at 114 (holding that "the prevailing party inquiry does not turn on the magnitude of the relief obtained"). The Court then went on to decide what amount of fees such a plaintiff is entitled to recover when only nominal damages are recovered. The Court held that "[w]hen a plaintiff recovers only nominal damages *because of his failure to prove an essential element of his claim for monetary relief*, the only reasonable fee is usually no fee at all." *Id.* at 115 (citation omitted; emphasis added). In other words, a plaintiff's complete lack of success in obtaining monetary damages precludes an award of fees only when a plaintiff could have been entitled to monetary relief if she had succeeded on her claim.

In this case, however, Sheppard has not failed to prove an essential element of her claim for monetary relief under section 2000e-2(m) because, as a matter of express statutory language, she cannot obtain monetary relief. Her lack of success in obtaining a money judgment cannot therefore preclude an award of attorney's fees under section 2000e-5(g)(2)(B).[6]

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6. The district court recognized this fact when it rejected Riverview's argument that *Farrar* precluded altogether an award of attorney's fees:

(Cont'd)

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Because a plaintiff in a mixed-motive case cannot recover money damages, a plaintiff's level of success must be measured against some other standard. The decision in *Farrar* focused on whether a plaintiff was awarded monetary damages where such damages were recoverable under the statute at issue. If the same analysis applied here, the correct inquiry would be whether the plaintiff obtained either declaratory or injunctive relief. Declaratory or injunctive relief is the only substantive relief that a plaintiff may recover under section 2000e-5(g)(2)(B). If it is granted, then the plaintiff has achieved a level of success

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> [Riverview's] position ignores the plain language of 42 U.S.C. § 2000e-5(g)(2)(B). Congress has spoken clearly, and the 1991 Act is quite explicit: the court "may grant . . . attorney's fees" in cases in which a defendant is adjudged to have discriminated but proves that it would have made the same decision in the absence of the illegal motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B). Denying recovery of attorney's fees in this situation on the rationale of "lack of success" would render the statute ineffective and practically meaningless. *Cf.* 2A Norman Singer, *Sutherland on Statutory Construction* § 46.06, at 119-20 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *United States Army Eng'g Ctr. v. Federal Labor Relations Auth.*, 762 F.2d 409, 416-17 (4th Cir. 1985); *Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir.), *cert. denied*, 375 U.S. 818 (1963). A wholesale denial of fees in this case is completely unjustified and flies in the face of the statute making such fees available.

Sheppard, 870 F. Supp. at 1380-81.

which indicates that a grant of attorney's fees is also proper. To read any other prerequisite into the statute exceeds the teachings of *Farrar* and effectively replaces Congress's judgment with the judgment of this court.[7]

Of course, that is exactly what the majority has done in this case. The majority suggests that merely establishing a violation of section 2000e-2(m) is not enough to merit a grant of attorney's fees because even when such a violation is established, "few public goals" may be promoted. *Ante* at 7. The majority therefore asserts that "in appropriate cases . . .

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7. In *Farrar* the plaintiff brought his complaint under 42 U.S.C. §§ 1983 and 1985, seeking $17 million in damages. The plaintiff had owned and operated a private school for delinquent, disabled, and disturbed teens. After a student died at the school in 1973, a grand jury returned a murder indictment charging the plaintiff with willful failure to administer proper medical treatment and failure to provide timely hospitalization. The State of Texas also obtained a temporary injunction closing the school. In his complaint the plaintiff alleged that his civil rights had been violated: he claimed a deprivation of liberty and property without due process by means of conspiracy and malicious prosecution aimed at closing his school. A jury eventually found that five of the six named defendants had conspired against the plaintiff but that this conspiracy was not the proximate cause of the injury suffered by the plaintiff. The plaintiff was therefore awarded nominal damages of one dollar (*i.e.*, one seventeen millionth of what he wanted). After the case took an initial trip to the fifth circuit, the district court awarded the plaintiff $280,000 in attorney's fees. *Farrar*, 506 U.S. at 105-07.

It was against this backdrop that the Supreme Court decided that the recovery of nominal damages did not justify the award of any fees. *Id.* at 114-16; *see id.* at 122 (O'Connor, J., concurring) (Section 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory. Yet one searches in vain for the public purpose this litigation might have served.").

courts should consider the reasons why injunctive relief was or was not granted, or the extent and nature of any declaratory relief." *Id.* The majority then cites Justice O'Connor's concurring opinion in *Farrar* for the proposition that "the decision [in *Farrar* also] suggested a more general proportionality consideration as well: whether the public purposes served by resolving the dispute justifies the recovery of fees." *Id.* at 7-8 (citing *Farrar*, 506 U.S. at 121-22 (O'Connor, J., concurring)). And the majority concludes that:

> [W]ithin [the] category of [mixed-motive] cases, there are large differences. Some mixed-motive cases will evidence a widespread or intolerable animus on the part of a defendant; others will illustrate primarily the plaintiff's unacceptable conduct which, by definition, will have justifed the action taken by the defendant. The statute allows district courts to distinguish among cases that are in reality quite different.

Id. at 8.

While the majority's analysis has superficial appeal, it is based on a faulty premise. That is, the majority evidently believes that simply establishing liability in a common mixed-motive case serves few public goals. Whether that is true is not for us to decide. By enacting section 2000e-2(m) Congress has expressly decided that establishing liability in a mixed-motive case does in fact promote important public goals. Indeed, section 2000e-2(m) was enacted to help eliminate discrimination in the workplace by overruling the Supreme

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Court's decision in *Price Waterhouse v. Hopkins*. As the House Committee on the Judiciary stated in its Report on the Civil Rights Act of 1991:

> The Court's holding in *Price Waterhouse* severely undermines protections against intentional discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason.
>
> The impact of this decision is particularly profound because the factual situation at issue in *Price Waterhouse* is a common one. As the Justice Department observed, "virtually every Title VII disparate treatment case will to somedegree entail multiple motives." Brief for the United Statesas Amicus Curiae, at 6.
>
> If Title VII's ban on discrimination is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be liable for their actions.

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H.R. Rept. 102-40(II) at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711; *see* H.R. Rept. No. 102-40(I), 102nd Cong., 1st Sess., at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 ("the Committee endorses and intends Section 203 of the legislation to restore the decisional law in effect in many of the federal circuits prior to the decision in *Price Waterhouse*").

Moreover, by enacting section 2000e-5(g)(2)(B), *Congress* decided that a successful plaintiff in a mixed-motive case is entitled to attorney's fees and costs. That congressional decision (along with the decision to enact section 2000e-2(m)) shows that sufficient public interests and goals are served and promoted to justify an award of fees whenever a violation of section 2000e-2(m) is established. And this is true even though a plaintiff's degree of success will be limited because she can not recover money damages and her eligibility for injunctive relief is limited. While this court may disagree with that decision, we must efectuate it nonetheless. Certainly, we *may not* eviscerate it, as the majority does here. *See Farrar*, 506 U.S. at 118 (O'Connor, J., concurring) ("When construing a statute, this Court is bound by the choices Congress has made, not the choices we might wish it had made.").

What is most disturbing about the majority's approach is its failure to appreciate that the mere fact of establishing liability in any mixed-motive case serves a number of public goals, the most important of which is the eradication of discrimination in employment decisions. Because Congress expressly provides that discrimination in a mixed-motive case is still actionable discrimination, Congress recognizes that the successful eradication of discrimination depends in part on plaintiffs having the ability to bring Title VII claims, including Title VII claims that eventually evolve into mixed-motive cases.

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The workplace is no place for discrmination, and the fact that an individual plaintiff may not recover monetary damages in a mixed-motive case does not undercut the deterrent value of allowing a plaintiff to establish liability in a mixed-motive case, especially when an employer faces the prospect of having to pay attorney's fees. Likewise, a grant of attorney's fees helps to eliminate discrimination in the workplace because a prospective plaintiff is more likely to bring suit to enforce the provisions of Title VII if the plaintiff knows that she will be able to recover attorney's fees even if her case evolves into a mixed-motive case. Indeed, a grant of attorney's fees reflects Congress's decision that a plaintiff in an employment discrimination case acts not only to vindicate her own interests, but the interests of society as a whole by acting as a "private attorney general." *Cf. Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (in the context of Farrar's section 1983 case "one searches in vain for the public purpose this litigation might have served."). The majority decision does not diectly mention, much less address, these important public goals.[8]

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8. In this case, which is one of first impression in this circuit, the EEOC continues to recognize the paramount importance that private plaintiffs have in enforcing Title VII. The EEOC has, accordingly, filed an *amicus* brief advocating that the district court's decision granting attorney's fees be upheld. As the EEOC says:

> Private actions play an important role in effectuating the purpose of Title VII. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). To encourage private actions, Congress has authorized the award of attorney's fees to plaintiffs who successfully prove a Title VII violation. *See* 42 U.S.C. §§ 2000e-5(k) & 2000e-5(g)(2)(B)(i) (sic). In this appeal, a defendant is challenging the district court's award of fees to a

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C.

A jury determined that Riverview discriminated against Sheppard in violation of section 2000e-2(m) of Title VII. The district court then granted Sheppard declaratory relief and attorney's fees. There are no special circumstances in this case that would even remotely suggest that the district court should have exercised its limited discretion under section 2000e-5(g)(2)(B) to deny Sheppard an award of fees. *See supra* at 22 n.5. I would therefore hold that Sheppard is entitled to an award of attorney's fees.[9]

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> Title VII plaintiff on grounds, which if generally applied, would make it unlikely that plaintiffs would recover their fees in most cases involving mixed motives. Because the result urged by the defendant is not supported by the applicable statutory language and would significantly diminish the incentive Congress provided to victims of discrimination to vindicate their rights under Title VII, we offer our views to the Court.

EEOC Br. at 1-2. Without doubt, these important public goals are seriously undermined by the court's decision today.

9. The majority's attempt to refute this conclusion is unavailing. The majority claims that it is anomalous for the proportionality considerations of *Farrar* to apply to plaintiffs for whom discrimination is the sole cause of an adverse employment decision and, at the same time, fail to apply these same considerations to mixed-motive plaintiffs. *Ante* at 11-12. What, of course, the majority does not recognize is that a plaintiff who establishes that discrimination is the sole cause for an adverse employment decision will have little, if any, difficulty overcoming *Farrar*'s proportionality hurdle. Thus, if there is an anomaly here, it is one in theory, not in fact.

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II.

I turn now to the second question posed by a plain reading of section 2000e-5(g)(2)(B). If an award of attorney's fees is granted, what amount should be awarded? In light of the express statutory language contained in section 2000e-5(g)(2)(B), that question is simple and straightforward. The amount of attorney's fees the court should award is that "demonstrated to be directly attributable only to the pursuit ofa claim under section 2000e-2(m)."

In particular, the issue of proportionality, which was paramount to the Supreme Court's decision in *Farrar*, is not relevant to the question of what amount of fees should be awarded under section 2000e-5(g)(2)(B). The statute itself makes this plain. Again, unlike both section 1988 and section 2000e-5(k), which provide a court with discretion to grant "a *reasonable* attorney's fee" (emphasis added), section 2000e-5(g)(2)(B) expressly dictates that the recoverable attorney's fee is the amount "directly attributable only to the pursuit of a claim

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Likewise, the majority's attempt to buttress its anomaly is equally unavailing. The majority lists several *hypothetical* circumstances that might render an award of fees unjust under section 2000e-5(g)(2)(B). *See id.* at 11. While I certainly agree that a mixed-motive plaintiff who has committed an unlawful act such as embezzlement is not a candidate for a grant of attorney's fees, nowhere does Riverview even hint that Sheppard committed any act, unlawful or not, that would lead a court to deny her fees. The outcome that the statute requires does not "take money from the pockets of *plaintiffs* solely to deposit it in the pocket of attorneys." *Id.* (emphasis supplied). Instead, it takes money from a *defendant* that has practiced discrimination against one of its employees, and it gives plaintiffs such as Sheppard the confidence of knowing that they will be able to pay their attorney's fees even if their case evolves into one of mixed motive.

under section 2000e-2(m)." There is no mention that the fee should be "reasonable," and thus, there is no need (and it is, in fact, improper) to engage in a proportionality determination. Because Congress has determined what is reasonable under section 2000e-5(g)(2)(B), Congress's standard must be applied.

The district court in this case followed the statutory directive and took great care in awarding a fee that was directly attributable only to the section 2000e-2(m) claim. *See Sheppard*, 870 F. Supp. at 1375-80 (reducing the amount of fees from $80,899.50 to $40,000). Indeed, Sheppard herself voluntarily asked the district court for a reduced fee of $40,000. On remand, I have no doubt that the district court will meet with a host of difficulties in implementing the majority's substantial gloss on section 2000e-5(g)(2)(B). Nonetheless, because Sheppard established a violation of section 2000e-2(m) and was granted declaratory relief, I believe that she has achieved one hundred percent success for purposes of an award of attorney's fees under section 2000e-5(g)(2)(B). On remand, she should therefore again be entitled to the $40,000 in fees previously awarded.

III.

Finally, the majority holds that a defendant's offer of judgment under Rule 68, Fed. R. Civ. P., in a mixed-motive case should bear on whether a plaintiff is entitled to attorney's fees and in what amount. *Ante* at 10 ("That Rule 68 may not require plaintiffs to bear their own post-offer attorney's fees in § 2000e-5(g)(2)(B) cases does not, however, prohibit courts from considering a plaintiff's rejection of a settlement offer as one factor affecting its decision whether to award fees and in

what amount."). Given the plain language of the section 2000e-5(g)(2)(B), the majority is again wrong.

Because section 2000e-5(g)(2)(B) expressly differentiates between "attorney's fees *and* costs," whether an offer of judgment has been made under Rule 68 has no bearing whatsoever on the issues of whether to award fees and in what amount. Both section 1988 and section 2000e-5(k) make attorney's fees "part of costs." Therefore, if Congress had wanted Rule 68 to apply to attorney's fees under section 2000e-5(g)(2)(B), it would have also included that language in section 2000e-5(g)(2)(B). The difference in the statutory language unmistakably shows that Congress did not take this path. As the district court correctly recognized in this case:

> Rule 68 of the Federal Rules of Civil Procedure is a cost-shifting rule designed to encourage settlement of disputes without the burden of costly litigation. To invoke the rule, the defendant in an action may offer "to allow judgment to be taken against [the defendant]" in a specified amount with costs "then accrued." If the plaintiff does not accept this offer of judgment and "[i]f the judgment finally obtained by the [plaintiff] is not more favorable than the offer, the [plaintiff] must pay the costs incurred after making the offer." Fed.R.Civ.P. 68. . . .
>
> . . . .
>
> The central issue to be resolved is whether the Rule 68 shifting of post-offer

"costs" should include plaintiff's post-offer attorney's fees. The Supreme Court has addressed this issue in a related context in *Marek v. Chesny*, 473 U.S. 1 (1985). Under *Marek*, the language of the underlying statute authorizing recovery of attorney's fees will determine whether attorney's fees are part of "costs" for Rule 68 purposes. 473 U.S. at 9. The statute at issue in *Marek*, 42 U.S.C. § 1988, clearly made available to a prevailing party " 'attorney's fees *as part of the costs*.' " *Id.* (quoting 42 U.S.C. § 1988)(emphasis added). Based on this clear and unambiguous language, the Supreme Court directed that, in an action for attorney's fees under 42 U.S.C. § 1988, "costs" for Rule 68 purposes should include attorney's fees. *Id.*

The statutory provision governing recovery of attorney's fees in this case, 42 U.S.C. § 2000e-5(g)(2)(B), is unlike the statute at issue in *Marek*. Instead, it provides that the court may grant "attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B). In light of the emphasis on the "plain language" of the underlying statute, the words "attorney's fees and costs" in section 2000e-5(g)(2)(B) assume critical importance and contrast sharply with the statute at issue in *Marek*, in which attorney's fees were specifically described "as part of" costs. . . .

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> When it enacted 42 U.S.C. § [2000e]5(g)(2)(B), Congress was well-aware of the *Marek* decision and the importance which the Supreme Court attributed to the distinction between the phrases "attorney's fees and costs" and "attorney's fees as part of costs." Indeed, the committee reports accompanying the 1991 Act include sharp criticism of the *Marek* opinion, speak of the need to "address" and "overrule" *Marek*, and disprove of the Supreme Court's reliance on "small and probably inadvertent differences in phrasing" and "*an accident* in legislative drafting." H.R. Rept. No. 102-40(I), 102nd Cong., 1st Sess., at 82 & n.77 (1991), *reprinted in* 1991 U.C.C.A.N. 549, 620; H.R. Rept. 102-40(II), *reprinted in* 1991 U.S.C.C.A.N. 694, 696, 724. . . .
>
> . . . .
>
> In sum, the *Marek* decision, the legislative history of the Civil Rights Act of 1991, familiar principles of statutory construction, and the public interest in vigorous enforcement of Title VII together direct that attorney's fees under 42 U.S.C. § 2000e-5(g)(2)(B) must be considered separate from costs in the operation of Rule 68.

Sheppard, 870 F. Supp. at 1381-84 (citations and footnotes omitted).

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There should be no disputing this analysis. No doubt Congress chose to allow a mixed-motive plaintiff "attorney's fees and costs" because (1) a mixed-motive plaintiff cannot recover money damages and (2) a mixed-motive case generally evolves into one as the litigation progresses. Thus, an offer of judgment under Rule 68 would always exceed the amount actually recovered, and a substantial part of the fees "directly attributable" to pursuit of a mixed-motive claim would likely be incurred after the offer is made. And, accordingly, if Congress had made attorney's fees part of costs, a plaintiff in a mixed-motive case would not be able to recover most of her fees "directly attributable" to pursuit of a claim under section 2000e-2(m). Such a result — which the majority now sanctions under section 2000e-5(g)(2)(B) — frustrates Congress's judgment that a mixed-motive employment decision is actionable discrimination.

* * *

The majority's rewrite of section 2000e-5(g)(2)(B) to reflect its own view as to whether and to what extent attorney's fees should be awarded thwarts the plain intent of Congress to encourage the exposure of discriminatory employment decisions. Again, I respectfully dissent.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED JULY 29, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-93-2663

THERESA L. SHEPPARD

Plaintiff

v.

RIVERVIEW NURSING CENTER, INC.,

Defendant

MEMORANDUM OPINION

This case is before the Court on plaintiff 's motion for an award of attorney's fees and costs. Plaintiff has requested a total award of $44,500. Defendant opposes this motion and argues that the plaintiff is not entitled to recover any attorney's fees. No oral hearing on this matter is necessary. Local Rule 105.6 (D. Md.).

I. Factual Background

Plaintiff filed this suit in September 1993 alleging violations of the Civil Rights Act of 1964, commonly known as Title VII. She alleged that she was laid off in April 1992 by the defendant because she was pregnant. Approximately five weeks after her suit was filed, the defendant made a $5,000 offer of judgment under Federal Rule of Civil Procedure 68. The

offer included "costs and attorney's fees accrued" as of the date of the offer. The plaintiff refused this offer.

After a four-day trial which began on October 31, 1994, the jury found that the plaintiff's pregnancy was a motivating factor in the defendant's decision to lay her off. The jury also found, however, that the defendant would have selected the plaintiff for the layoff even in the absence of the unlawful motive — *i.e.*, even if the defendant had not considered her pregnancy in making its decision. In light of the verdict and pursuant to the Court's instructions, the jury awarded no compensatory damages, and the punitive damages phase of the trial was not reached. In accordance with 42 U.S.C. § 2000e-5(g)(2)(B)(ii), the Court awarded no backpay. The Court also denied the plaintiff's request for injunctive relief, finding no danger of a continuing violation of the plaintiff's right to be free from illegal discrimination. Finally, the Court entered a declaratory judgment in the plaintiff's favor in accordance with the jury's finding that her pregnancy was a motivating factor in the defendant's decision to lay her off. Plaintiff's motion for a new trial was later denied.

II. Legal Background

This Title VII case is one of the first going to trial before this Court to be governed by the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991) [hereinafter 1991 Act]. The 1991 Act represents a response to a perceived need for expanded remedies under Title VII and makes compensatory and punitive damages available to victims of intentional employment discrimination. *See* 42 U.S.C. § 1981a; H.R. Rept. No. 102-40(II), 102nd Cong., lst Sess., at 24-30 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-22. Another

important provision of the 1991 Act, now codified at 42 U.S.C. § 2000e-2(m), applies to so-called "mixed-motive" or "same-decision" cases. This provision was designed to overturn the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Supreme Court held that, even where an employer relies in part on an impermissible motive in making an employment decision, the employer would not be liable for violating Title VII if it could prove that it would have made the same decision in the absence of the prohibited motivation.

Congress modified this outcome. The 1991 Act provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). In other words, an employer has violated Title VII if any of the prohibited criteria played any role at all in the disputed employment decision. However, if legitimate factors also motivated the decision and the employer can demonstrate that the same decision would have been made if it had not relied on the impermissible motivating factor, the damages that the plaintiff may recover for the Title VII violation are verylimited. The plaintiff may not recover backpay, compensatory damages or punitive damages, and the court may not issue any order requiring any admission, reinstatement, hiring, promotion, or payment. 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The only remedies available are declaratory relief, limited types of injunctive relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i).

Appendix C

III. Controlling Statute and Other Attorney's Fee Provisions

In light of the jury's findings that the plaintiff 's pregnancy was a motivating factor in the defendant's decision to lay her off and that the defendant would have made the same decision in the absence of the impermissible factor, 42 U.S.C. § 2000e-5(g)(2)(B)[1] governs the relief available to the plaintiff and controls this dispute over attorney's fees. Defendant's contention that 42 U.S.C. § 1988[2] governs because the plaintiff sought relief under 42 U.S.C. § 1981a in her complaint lacks merit. As described above, section 1981a makes compensatory and punitive damages available to victims of intentional discrimination prohibited by Title VII. In this case, however, the plaintiff is precluded from recovering such damages by 42 U.S.C. § 2000e-5(g)(2)(B); therefore, section 1981a is inapplicable and section 1988 does not govern her claim for attorney's fees. Plaintiff's claim is governed by section 2000e-5(g)(2)(B), which specifically addresses the relief available in same-decision cases.

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1. 42 U.S.C. § 2000e-5(g)(2)(B) provides, on a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court — (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m), (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

2. 42 U.S.C. § 1988(b) provides in relevant part, In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

The defendant argues in the alternative that the general Title VII fee-shifting provision, 42 U.S.C. § 2000e-5(k),[3] governs this case. Under this section, a prevailing party in "any" Title VII action may be awarded attorney's fees. 42 U.S.C. § 2000e-5(k). It is axiomatic that where two statutory provisions apply to a given situation, one specific and one general, the more specific one controls. As the Supreme Court has explained, "[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned, both in fact being parts of [the same act]. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1980) (per curium). *See also Farmer v. Employment Security Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993).

Section 2000e-5(g)(2)(B), unlike section 2000e-5(k), applies only to mixed-motive Title VII cases in which the defendant proves that the same decision would have been made in the absence of the discriminatory motive. The jury in this case made precisely the factual determination described by the specific statute. Consequently, the relief available in this action is determined solely by reference to the specifically applicable statute, section 2000e-5(g)(2)(B).

Section 2000e-5(g)(2)(B), while authorizing recovery of attorney's fees and costs in same-decision cases, also contains language limiting such fees and costs to those "demonstrated to be directly attributable only to the pursuit of a claim under

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3. 42 U.S.C. § 2000e-5(k) provides, In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

section 2000e-2(m). . . ." 42 U.S.C. § 2000e-5(g)(2)(B)(i). This restrictive language does not apply to a case such as this one, in which there is only one claim of discrimination, which turns out to be a mixed-motive claim, ever at issue in the lawsuit.[4]

IV. Calculating Plaintiff's Attorney's Fees and Costs

The plaintiff claims she incurred attorney's fees in the amount of $80,899.50 and costs of $4,509.74. The plaintiff has voluntarily reduced her request for attorney fees by approximately fifty percent, from $80,899.50 to $40,000.

Counsel for a party statutorily entitled to recover attorney's fees must exercise "billing judgment" and exclude from a fee request hours that are excessive, redundant, or

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4. The passage may have more force in cases in which a plaintiff brings more than one claim of discrimination — for instance, a case alleging numerous instances of discriminatory failure to hire or promote — and in which the jury ultimately finds that, with respect to some of the claims, the employer would have made the same decision in the absence of the illegal motivating factor. Under 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), a party who "prevails" on at least one claim under some circumstances may receive attorney's fees for work on related claims on which it was unsuccessful. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Goodwin v. Metts*, 973 F.2d 378, 381-83 (4th Cir. 1992). A more restrictive rule may apply to successful claims under section 2000e-5(g)(2)(B) in light of this emphasis on attorney's fees and costs "directly attributable only" to pursuit of the mixed motive claim. The language stresses Congress, sensitivity to the principle of causation and the need to circumscribe the defendant's liability for actions it would have taken anyway. *See* H.R. Rept. No. 102-40(I), 102 Cong., lst Sess., at 49 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 587; H.R. Rept. 102-40(II), 102 Cong., lst Sess., at 19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 712.

otherwise unnecessary. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1982). "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Id.* at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)); *Daly v. Hill*, 790 F.2d 1071, 1079 (4th Cir. 1986). In this case, the plaintiff's motion for attorney's fees did not specifically exclude such hours, but instead reduced the overall dollar figure by a blanket fifty percent. Although the court will grant the plaintiff's motion for attorney's fees in the amount of $40,000, a more refined analysis than that of the plaintiff is appropriate. *E.E.O.C. v. Service News Co.*, 898 F.2d 958, 965 (4th Cir. 1990) (disapproving of brevity of court's analysis and noting that "courts must consider and discuss the twelve factors set forth in *Johnson*").

The starting point for establishing the proper amount of an attorney's fee award is the number of hours reasonably expended, multiplied by a reasonable hourly rate. *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994). *See also Hensley*, 461 U.S. at 433; *Blum v. Stenson*, 465 U.S. 886, 888 (1984). To determine the appropriate level of hours and rates, the Fourth Circuit has long applied the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Barber v. Kimbrell*, 577 F.2d 216, 266 (4th Cir. 1978) (adopting twelve factor test), *cert. denied*, 439 U.S. 934 (1978); *Daly*, 790 F.2d at 1078 (*Johnson* factors are to be considered at the stage of setting reasonable rate and number of hours reasonably expended). The *Johnson* factors are 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6)

whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. *Rum Creek Coal Sales*, 31 F.3d at 175, *citing Johnson*, 488 F.2d at 717-19.

After properly adjusting the claimed hours and rates to account for the twelve *Johnson* factors, these figures are multiplied together to produce the "lodestar," which is a presumptively reasonable attorney's fee award. *Daly*, 790 F.2d at 1078; *E.E.O.C. v. Service News Co.*, 898 F.2d at 965. *See also Blum*, 465 U.S. at 888; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (there is a strong presumption that the lodestar figure represents a reasonable fee). In exceptional circumstances where the plaintiff's degree of success is not accurately reflected in the number of reasonable hours allowed, the lodestar figure may also be adjusted to account for the results obtained. *Daly*, 790 F.2d at 1078; *Hensley*, 461 U.S. at 440.

A. Reasonable Hourly Rates

A reasonable hourly rate is one set at "prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. The Fourth Circuit has recently explained that, "Market rates may be proved by rates in which clients normally and willingly pay the petitioning attorneys." *Rum Creek Coal Sales*, 31 F.3d at 175. The court also has discretion to make factual findings based on personal knowledge of prevailing rates in the relevant market. *Id.* at 179.

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In this case, plaintiff's attorneys charged the following average hourly rates during the pendency of the litigation:

Donald N. Rothman	$254.77
Robert C. Kellner	$210.00
Bradford W. Warbasse	$166.24
Judy A. Murphy	$75.00

The Court finds that the rate charged for Mr. Rothman's services in this case is excessive and does not reflect the prevailing market rate in Baltimore for civil rights attorneys. While Mr. Rothman has extensive litigation experience, plaintiff's petition does not indicate that he has any special expertise in the area of employment discrimination or civil rights matters generally. The Court will not mechanically apply rates which are charged by attorneys in complex civil matters to determine the proper hourly rate for a civil rights case. *Trimper v. City of Norfolk, VA.*, 846 F. Supp. 1295, 1305 (E.D. Va. 1994). *See also Buffington v. Baltimore County, MD.*, 913 F.2d 113, 129 (4th Cir. 1990) (experienced attorneys representing civil rights plaintiff not entitled to the same hourly rate normally charged by them in complex civil matters), *cert. denied*, 499 U.S. 906 (1991); *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 737 (11th Cir. 1988) (noting that "market rate for federal civil litigation is too over inclusive" for setting hourly rates under § 1988). Accordingly, Mr. Rothman's hourly fee will be reduced to $200.00. This figure is reasonable in that it represents an amount slightly lower than that of Mr. Kellner, who is chairman of the employment law department at the plaintiff's law firm, yet still represents a substantial sum, as is justified by Mr. Rothman's general litigation experience. The Court is also guided by its own personal knowledge of market rates for experienced attorneys in the Baltimore area.

The fees charged by Mr. Warbasse and Mr. Kellner are reasonable in light of the rates prevailing in Baltimore for experienced attorneys. The record contains evidence, in the form of an affidavit from the comptroller of the plaintiff's law firm, that these rates are each attorney's customary fee for like work. Under *Rum Creek Coals*, 31 F.3d at 175, this evidence is sufficient to establish the reasonableness of the rates. Because the defendant has produced no evidence tending to show that a lower rate actually prevails in the Baltimore market, the Court accepts plaintiff's rates as reasonable figures for these two attorneys.

Finally, the Court also accepts the hourly rate of $75.00 for work done by Ms. Murphy, a litigation paralegal with over twelve years of experience. Ms. Murphy's customary fee was discounted for this case, and the defendant does not dispute that it represents a reasonable charge for paralegal services.

B. Reasonable Number of Hours

The Supreme Court has directed district courts to "exclude from the initial fee calculation hours that were not reasonably expended." *Hensley*, 461 U.S. at 434 (internal quotations omitted). The Fourth Circuit's most recent discussion of the appropriate method to calculate attorney's fees directs the court to apply the twelve *Johnson* factors to the number of hours claimed by the plaintiff and to make adjustments as appropriate. *Rum Creek Coals*, 31 F.3d at 175. Accordingly, these factors will be considered below in conjunction with the Court's review of the attorney time and billing records submitted by the plaintiff.

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1) Time and Labor Required

In determining the appropriate number of hours for which plaintiff may recover attorney's fees, this first *Johnson* criteria is obviously the most important. In her motion[5] for attorney's fees, the plaintiff requests compensation for the following numberof attorney work hours:

Donald N. Rothman	67.4 hours
Robert C. Kellner	4.5 hours
Bradford W. Warbasse	325.8 hours
Judy A. Murphy	94.3 hours

After reviewing the detailed billing records submitted in this case, the Court finds that most of the hours charged by plaintiff's attorneys were reasonable expenditures of time and are fairly compensable at their market rates. Nevertheless, certain reductions are appropriate.

As an initial matter, the Court notes that this is not a three-partner case. Plaintiff's attorneys' staffing of this case appears unnecessarily "top-heavy," a factor which is taken into account in the analysis that follows.

a. *Mr. Rothman* - Hours claimed: 67.4
Hours allowed: 58.2

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5. Contrary to the defendant's assertion, plaintiff's motion contains adequate detail and information to satisfy the requisites of Local Rule 109.2.B and *Blum v. Stenson*, 465 U.S. 886 (1984). Although an alternative format (one which included summaries of hours expended on various tasks) would have been far more helpful to the Court, the motion will not be dismissed as defective.

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With respect to the work performed by Mr. Rothman, the Court finds that 9.2 of those hours were redundant or insufficiently documented. Specifically, Mr. Rothman claims compensation for 12 hours of "trial" on November 1, 1994, a day in which court was in session for no more than 6.5 hours. In the absence of any explanation at all for the remaining 5.5 hours, that time is disallowed as insufficiently documented. Mr. Rothman also claims compensation for 3.7 hours of preparation of two witness, Mary Lou Seymour and Ms. D'Antoni, on October 11, 1994, with Mr. Warbasse. Neither of these witnesses' testimony at trial was at all lengthy or complicated, and the Court finds that it was unnecessary and redundant for two highly paid partners to spend several hours jointly preparing them. Accordingly, Mr. Rothman's time is disallowed, while Mr. Warbasse's will be compensated.

The Court finds that the rest of Mr. Rothman's time is properly documented and reasonably spent. Defendant's contention that the plaintiff is not entitled to compensation for more than one attorney's services on this case is unfounded and somewhat disingenuous in light of its own staffing of the case in an analogous manner.

b. *Mr. Kellner* - Hours claimed: 4.5
Hours allowed: 1.5

Given that highly paid partners performed all of the legal work on this case, including elementary legal research, and the total absence of any junior, less expensive attorneys, the Court feels that it is appropriate to strictly scrutinize the billing records to ensure that every hour charged at the partner billing rates was justified and an efficient use of time. This is particularly so in the case of Mr. Kellner's time. Mr. Kellner

chairs the employment law department at plaintiff's law firm. Almost all of his time billed to this case seems to be devoted to conversations with Mr. Warbasse and review of Mr. Warbasse's work. Mr. Warbasse is an employment law partner with ten years of experience, whose time was billed at an average of $166.10 per hour in this case. If, as plaintiff argues, Mr. Warbasse's work is worth his substantial fee, much of Mr. Kellner's time on this case was redundant and unnecessary. For this reason, the 1.2 hours of Mr. Kellner's time which was devoted to reviewing Mr. Warbasse's work on the plaintiff's Opposition to Defendant's Motion for Summary Judgment will be disallowed. The .2 hours of Mr. Kellner's time devoted to discussing "w/ BWW re statement of facts" will be disallowed for the same reason. The simple statement of facts in this case hardly required a collective $376.10 dollars per hour worth of legal talent.

Besides work which was redundant of Mr. Warbasse's, the Court finds a relatively significant amount of Mr. Kellner's time was spent on work which was redundant of Mr. Rothman's high priced efforts. For example, Mr. Rothman billed 1.2 hours for preparing closing arguments with Mr. Warbasse. It was unnecessary for Mr. Kellner also to spend .4 hours helping Mr. Warbasse to prepare his closing argument. Time spent by Mr. Kellner to "review opening statement" with Mr. Warbasse (estimated at .3 hours) and discuss "strategy" (.2 hours) and "jnov and attorneys fees" (.3 hours) with him is similarly redundant.

In addition, the entry for .2 hours on November 9, 1993, which reads simply "w/ BWW," will be disallowed as insufficiently documented. Finally, another .2 hours will be deducted from the entry for November 30, 1993, attributed to

"statistical analysis." This was a straightforward case alleging direct evidence of discrimination stemming from an incident in which five employees were laid off, three of whom were pregnant. No "statistical analysis" at all — let alone any worth $210 an hour was necessary.

c. *Mr. Warbasse* - Hours claimed: 325.8
Hours allowed: 314.1

The Court finds that the majority of hours expended by Mr. Warbasse on this case were reasonable and compensable. Nevertheless, the following hours are disallowed.

First, time spent in certain discussions with Mr. Kellner which the Court has determined to have been unnecessary or redundant will not be compensated. The appropriate reductions are .2 hours on March 21, 1994, .3 hours on March 31, 1994, and .2 hours on April 22, 1994.

Secondly, three hours will be deducted from time billed as "research" during the first month of this case and one hour will be deducted for the time devoted specifically to research of the "Civil Rights Act" on October 12, 1993. Counsels demonstrated unfamiliarity after the trial with the language of the very statute governing the plaintiff's claim and the remedies available to her justifies denying compensation for this research time, which the Court finds was not spent productively.

The time spent by Mr. Warbasse in preparing the plaintiff's proposed jury instructions was excessive. The instructions submitted were largely taken verbatim from a popular text of pattern instructions. "Jury instructions" appears five times in

the billing records and it appears that approximately 5.5 hours was spent on this task. Only 2 hours should have been necessary to assemble the submitted instructions. Accordingly, 3.5 hours will be deducted from Mr. Warbasse's total.

Finally, the time Mr. Warbasse spent researching such basic issues as "4th Circuit standards, motion for a direct[ed] verdict, judgment notwithstanding a verdict" and "standards for motions for judgment as a matter of law" will be struck. Mr. Rothman was called into this case for his 40-plus years of litigation experience. Given that experience and Mr. Warbasse's claimed expertise, the approximately 3.5 hours Mr. Warbasse spent researching these fundamental litigation standards should not havebeen necessary.

The Court does not agree with the defendant that hours devoted to research regarding punitive damages issues should be struck. Although the plaintiff ultimately did not prevail at trial in a manner which necessitated that the punitive damages phase of the trial go forward, it was not unreasonable for Mr. Warbasse to have researched and prepared arguments relating to punitive damages in anticipation of a more favorable verdict. The issue was not a frivolous one and the Court notes that the defendant's motion for summary judgment on this point was denied. Thus, the plaintiff should be compensated for the time her attorneys devoted to punitive damages issues. The Court finds that the number of hours claimed for this work was reasonable.

d. *Ms. Murphy*- Hours claimed: 94.3
Hours allowed: 65.9

Ms. Murphy spent approximately 51.7 hours analyzing and charting work schedules for the laundry department

employees. The Court finds this total to be excessive and unwarranted by the charts prepared by Ms. Murphy which were presented at trial. Approximately two-thirds of this total, or 35.0 hours will be allowed.

The Court also regards the 33.7 hours Ms. Murphy spent outlining and summarizing various depositions to be excessive and unnecessary in this straightforward case. Once again, approximately one-third of the time, or 11.7 hours, will be disallowed. The rest of the hours billed by Ms. Murphy seem reasonable and justified.

2) Novelty and Difficulty of the Questions

No adjustment is warranted for the novelty or difficulty of the questions presented in this case. This was a simple and very straightforward claim alleging direct evidence of intentional employment discrimination. It revolved around one incident, one statement and one meeting.

3) Skill Requisite to Perform the Legal Service Properly

The Court finds that this was not a case demanding extraordinary skill to perform. As explained above, both the claim and the defenses raised by the defendant were straightforward. To the extent that counsels relative skill level impacted their fees on this case, such variations are already reflected in the market price for counsels services. Thus, no adjustment is required to account for this factor.

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4) Preclusion of Other Employment by the Attorney Due to Acceptance of the Case

The plaintiff does not argue and presents no evidence that the number of compensable hours should be enhanced to account for her attorneys' lost opportunities. The Court accordingly finds that no adjustment is warranted on the basis of this factor.

5) Customary Fee

This factor has already been discussed in the Court's determination of reasonable hourly rates in this case and does not impact the appropriate number of hours which should be included in the award of attorney's fees.

6) Attorney's Expectations at the outset of the Litigation - Whether the Fee is Fixed or Contingent

Neither party has provided the Court with information regarding this factor, and neither party argues that this factor should bear upon the Court's determination of the reasonable number of attorney hours for which the plaintiff should be compensated. Moreover, contingency multipliers may not be allowed in statutory fee cases. *City of Burlington v. Dague*, __ U.S. __, 112 S.Ct. 2638 (1992). Accordingly, there is no basis for adjusting the number of hours on this basis.

7) Time Limitations Imposed by the Client or the Circumstances

No burdensome or extraordinary time constraints were imposed by the litigation in this case.

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8) Amount Involved and the Results Obtained

In her motion to recover attorney's fees, the plaintiff voluntarily and substantially reduced the requested fee in light of her failure to prove that she would not have been laid off in the absence of the defendant's discrimination and her consequent failure to recover any damages at trial. The plaintiff did not reduce the number of hours claimed as reasonable, but rather reduced the final lodestar figure by approximately fifty percent. Given the Court's analysis disallowing $11,786.02 of the fees, the plaintiff's ultimate request represents approximately a forty-two percent reduction in the lodestar figure. No additional reduction in the number of hours is warranted. In light of the plaintiff's moderation, this case does not require the Court to determine whether such a downward adjustment is appropriate generally in Title VII cases in which the plaintiff recovers no damages because the defendant proves that the same decision would have been made in the absence of the discriminatory motivation. The plaintiff has requested only $40,000 in attorney's fees and the Court is guided by that request.

The defendant is incorrect in asserting that this case is analogous to one in which a civil rights plaintiff technically prevails at trial but recovers only nominal damages. In such a case, the Court would properly deny recovery of attorney's fees altogether. *See Farrar v. Hobby*, __ U.S. __ 113 S. Ct 566, 575 (1992) (for a plaintiff who recovers only nominal damages "the only reasonable fee is usually no fee at all."). This argument is based on the language of 42 U.S.C. § 1988 and cases decided pursuant to that statute. As discussed above, section 1988 does not control this dispute. *See supra*, pages 4-5.

Moreover, the defendant's position ignores the plain language of 42 U.S.C. § 2000e-5(g)(2)(B). Congress has spoken clearly, and the 1991 Act is quite explicit: the court "may grant . . . attorney's fees" in cases in which a defendant is adjudged to have discriminated but proves that it would have made the same decision in the absence of the illegal motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B). Denying recovery of attorney's fees in this situation on the rationale of "lack of success" would render the statute ineffective and practically meaningless. *Cf.* 2A Norman Singer, *Sutherland on Statutory Construction* § 46.06, at 119-20 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *United States Army Eng'g Ctr. v. Federal Labor Relations Auth.*, 762 F.2d 409, 416-17 (4th Cir. 1985); *Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir. 1963), *cert. denied*, 375 U.S. 818 (1963). A wholesale denial of fees in this case is completely unjustified and flies in the face of the statute making such fees available.

9) Experience, Reputation and Ability of the Attorneys

The Court finds that this factor is, as it should be, fully reflected in the market rate for plaintiff's attorneys' services.

10) Undesirability of the Case

Although the plaintiff alleges that employment discrimination cases are generally considered undesirable, she has presented no evidence that she had difficulty retaining competent counsel to represent her or that there is a dearth of lawyers willing to take such cases in the Baltimore market. For these reasons, this factor will not affect the Court's analysis.

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11) Nature and Length of the Professional Relationship with the Client

Neither party has provided the Court with information regarding this factor, and neither party argues that this factor should bear upon the Court's determination of the reasonable number of attorney hours for which the plaintiff should be compensated. Accordingly, there is no basis for adjusting the number of hours on the basis of the plaintiff's relationship with her attorneys.

12) Awards in Similar Cases

Given the plaintiff's substantial voluntary reduction in her fee request in this case and absence of reported cases arising under 42 U.S.C. § 2000e-2(m) and 42 U.S.C. § 2000e-5(g)(2)(B), awards in other Title VII cases are not useful guides to the appropriate attorney's fee to be allowed here.

C. Totals

The above analysis of plaintiff's motion for attorney's fees and supporting documentation yields the following totals as appropriate compensation:

Rothman: 58.2 hrs. at $200.00/hr.	=	$11,640.00
Kellner: 1.5 hrs. at $210.00/hr.	=	315.00
Warbasse: 314.1 hrs. at $166.24/hr.	=	52,215.98
Murphy: 65.9 hrs. at $75.00/hr.	=	4,942.50

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TOTAL FEES (prior to voluntary reduction for limited success)	$69,113.48
TOTAL FEE - AFTER PLAINTIFFS VOLUNTARY REDUCTION:	$40,000.00

D. Costs

The plaintiff has requested an award in the amount of $4,509.74 for "costs." These include litigation expenses for items such as duplicating, messenger service, investigation services and filing fees. Plaintiff is entitled to recover all such costs which are reasonable and normally passed on to a client. *Daly v. Hill*, 790 F.2d 1071, 1082-84 (4th Cir. 1986) ("attorney's fees and expenses are in separably intertwined as equally vital components of the costs of litigation"); *Laffey v. Northwest Airlines*, 746 F.2d 4, 30 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The Court finds that the plaintiff's requested costs of $4,500.00 were reasonably incurred in preparing this case and are recoverable from the defendant.

V. Effect of Rule 68

Rule 68 of the Federal Rules of Civil Procedure is a cost shifting rule designed to encourage settlement of disputes without the burdens of costly litigation. To invoke the rule, the defendant in an action may offer "to allow judgment to be taken against [the defendant]" in a specified amount with costs "then accrued." If the plaintiff does not accept this offer of judgment and "[i]f the judgment finally obtained by the [plaintiff] is not more favorable than the offer, the [plaintiff] must pay the costs

incurred after the making of the offer." Fed. R. Civ. P. 68. *See also Marryshow v. Flynn*, 986 F.2d 689, 691 (4th Cir. 1993).

To effect this provision, the Court must compare the judgment finally obtained at trial with the earlier offer of judgment. In a case involving a fee-shifting statute such as this one, if the offer of judgment exceeds the judgment finally obtained, then the plaintiff must pay her own post-offer costs instead of shifting them to the defendant.[6] If the offer of judgment does not exceed the judgment at trial, then the defendant may have to pay the plaintiff's post-offer costs in accordance with the applicable fee-shifting statute.

Before the Court may make the appropriate comparison between the judgment finally obtained at trial and the earlier offer of judgment, it must determine the value of the judgment finally obtained. In this case, the plaintiff received only a declaratory judgment at trial, but is entitled to recover attorney's fees and costs. *See* 42 U.S.C. § 2000e-5(g)(2)(B). It follows that the judgment finally obtained by the plaintiff for Rule 68 purposes consists of a declaratory judgment and attorney's fees and costs.

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6. This language in Rule 68 does not imply that the defendant's post-offer costs may be shifted to the plaintiff, but may only prevent the plaintiff from shifting her post-offer costs to the defendant. A civil rights defendant may not be awarded attorney's fees unless the trial court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978). *See also Hugies v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam). Such a finding is clearly unwarranted in the present case, in which the jury determined that the defendant had illegally discriminated against the plaintiff on the basis of her pregnancy.

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In making the Rule 68 comparison between the judgment finally obtained and the offer of judgment, the Court must use "like judgments." *Marryshow*, 986 F.2d at 692. Where the offer of judgment included costs and attorney's fees then accrued, the judgment to which it must be compared is the amount of the verdict plus the amount of costs and attorney's fees actually awarded by the court *for the period that preceded the offer. Id.* Thus, the Court must determine pre-offer attorney's fees and costs in this case and compare them to the $5,000 offer of judgment the plaintiff rejected.

A. Comparing Pre-Offer Fees and Costs

The Fourth Circuit has explicitly directed that pre-offer attorney's fees and costs must be valued in the same manner "actually adopted by the Court" with respect to overall fees and costs. *Marryshow*, 986 F.2d at 692. In *Marryshow*, the court had reduced the plaintiff's lawyers, hourly fee by $50.00 and then reduced the total fee by a flat ten percent. These reduced figures were then used to determine the fees accrued prior to rejection of the offer of judgment. *Id.* For this reason, the plaintiff's position that her voluntary reduction of the fee request in this case should not apply to the calculation of pre-offer fees is unfounded. Accordingly, the Court will determine pre-offer attorney fees in the same manner as is appropriate for evaluating the overall fee request.

Plaintiff's motion calculates attorney's fees and costs accrued as of the date of the Rule 68 offer of judgment, October 21, 1993, at a total of $6,715.52, including costs of $167.02 and attorney's fees of $6,548.50. This amount should first be reduced to a total of $6,050.56, to account for the amounts disallowed by the Court and then further reduced to $3,509.32,

to incorporate the forty-two percent lodestar reduction made by the plaintiff. Quite obviously, the plaintiff's total award of pre-offer fees and costs is less than the $5,000.00 offer of judgment. Accordingly, under Rule 68, "the offeree must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68.

B. What "Costs" are Shifted

The central issue to be resolved is whether the Rule 68 shifting of post-offer "costs" should include plaintiff's post-offer attorney's fees. The Supreme Court has addressed this issue in a related context in *Marek v. Chesny*, 473 U.S. 1 (1985). Under *Marek*, the language of the underlying statute authorizing recovery of attorney's fees will determine whether attorney's fees are part of "costs" for Rule 68 purposes. 473 U.S. at 9. The statute at issue in *Marek*, 42 U.S.C. § 1988, clearly made available to a prevailing party " 'attorney's fees *as* " '*part of the costs*.' " *Id.* (quoting 42 U.S.C. § 1988) (emphasis added). Based on this clear and unambiguous statutory language, the Supreme Court directed that, in an action for attorney's fees under 42 U.S.C. § 1988, "costs" for Rule 68 purposes should include attorney's fees. *Id.*

The statutory provision governing recovery of attorney's fees in this case, 42 U.S.C. § 2000e-5(g)(2)(B), is unlike the statute at issue in *Marek*. Instead, it provides that the court may grant "attorney's fees *and costs.*" 42 U.S.C. § 2000e-5(g)(2)(B). In light of the Supreme Court's emphasis on the "plain language," of the underlying statute, the words "attorney's fees and costs" in section 2000e-5(g)(2)(B) assume critical importance and contrast sharply with the statute at issue in *Marek*, in which attorney's fees were specifically described "as part of" costs. In *Marek* the Supreme Court rejected the

argument that such subtle variations in phrasing could not be determinative. *Marek*, 473 U.S. at 9, 11. Indeed, Justice Brennan's dissent in *Marek* stresses this point and objects to the importance the majority attributes to "picayune differences" in statutory phraseology" such as variations between the words "as" and "and." *Id.* at 15, 23 (Brennan, J., dissenting).

When it enacted 42 U.S.C. § 5(g)(2)(B), Congress was well-aware of the *Marek* decision and the importance which the Supreme Court attributed to the distinction between the phrases "attorney's fees and costs" and "attorney's fees as part of costs." Indeed, the committee reports accompanying the 1991 Act include sharp criticism of the *Marek* opinion, speak of the need to "address" and "overrule" *Marek*, and disapprove of the Supreme Court's reliance on "small and probably inadvertent differences in phrasing" and *"an accident* in legislative drafting." H. R. Rept. No. 102-40 (I), 102nd Cong., lst Sess., at 82 & n.77 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 620; H.R. Rept. 102-40(II), 102nd Cong., lst Sess., at 4, 30 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696, 724.[7] The legislative history also cites Justice Brennan's dissent in *Marek* and criticizes the court's emphasis on seemingly random variations in the words used to connect the terms "attorney's fees" and "costs" in 119 federal fee-shifting statutes. H.R. Rept. No. 102-40(I), 102nd Cong., lst Sess., at 82 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 620.

As reflected in this legislative history, the particular

7. The attempt, reflected in the committee reports quoted above, to reverse the effect of the *Marek* decision on all Title VII plaintiffs by replacing the "as part of costs" language of section 2000e-5(k) with the "and costs" formulation was not successful and the change is not reflected in the 1991 Act.

language "as part of costs" in 42 U.S.C. § 2000e-5(k) received explicit scrutiny during consideration of the 1991 Act. Significantly different words were used in 42 U.S.C. § 2000e-5(g)(2)(B). Well-recognized canons of statutory construction address this situation. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 22 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). *See also United States v. Wooten*, 688 F.2d 941, 950 (4th Cir. 1982); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("Where explicit language is used in one part of a statute to mean something and different language is later used, there is a strong inference that the two provisions do not mean the same thing."), *cert. denied*, 469 U.S. 881 (1984).

The disparity created between the two Title VII provisions, 42 U.S.C. § 2000e-5(g)(2)(B) and 42 U.S.C. § 2000e-5(k), which authorize recovery of plaintiff's attorney's fees is not an illogical one. As part of the 1991 Act, compensatory and punitive damages were made available as additional remedies to successful Title VII plaintiffs. As part of the same Act, these remedies, as well as backpay, were explicitly denied to Title VII plaintiffs who succeed in proving illegal discrimination, but fail to prove that the employer would have made a different decision in the absence of the illegal motivation. In order to assure vigorous enforcement of Title VII, even in cases where an employer may have acted with mixed motives, Congress had to ensure that such plaintiffs would be able to hire competent counsel to pursue their claims. Because no monetary damages are available where section 2000e-5(g)(2)(B) applies, if post-offer attorney's fees were also potentially cut off, few attorneys

would be willing to handle mixed-motive cases at all. By deliberately and significantly altering the verbal formulation in section 2000e-5(g)(2)(B) to separate attorney's fees from "costs," Congress has steered a middle course. Plaintiffs will recover no damages, but will be fully compensated for their costs in enforcing Title VII.

In sum, the *Marek* decision, the legislative history of the Civil Rights Act of 1991, familiar principles of statutory construction, and the public interest in vigorous enforcement of Title VII together direct that attorney's fees under 42 U.S.C. § 2000e-(5)(g)(2)(B) must be considered separate from costs in the operation of Rule 68.

VI. Conclusion

Because the plaintiff in this case rejected a Rule 68 offer of judgment that was higher than the judgment finally obtained at trial, she must bear her own post-offer costs under the Rule. However, the plaintiff's post-offer attorney's fees are not part of these "costs." Plaintiff will recover reasonable pre- and post-offer attorney's fees in the amount of $40,000, as determined by the Court. In addition, she will recover pre-offer costs of $167.02 for a total award of $40,167.02.

An appropriate order will be entered separately.

VII. The Last Word

On my office wall, there hangs a nineteenth century English print entitled *The Lawsuit*, showing two farmers fighting over a stationary cow — one pulling her by the horns and the other by the tail — while a bewigged barrister happily

milks her. This case certainly demonstrates that nothing much has changed. The plaintiff and the defendant are right where they started, while the lawyers, pails hold all the milk.

s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

Dated: December 19, 1994

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-93-2663

THERESA L. SHEPPARD,

Plaintiff

v.

RIVERVIEW NURSING CENTRE, INC.,

Defendant

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 19th day of December, 1994, by the Court, ORDERED:

1. That plaintiff's Motion Requesting an Award of Attorney's Fees and Costs BE, and it hereby IS, *GRANTED;*

2. That plaintiff is hereby awarded attorney's fees in the amount of $40,000.00 and costs in the amount of $167.02, for a total award of $40,167.02; and

3. That the Clerk of Court mail copies of the foregoing Memorandum Opinion and of this Order to counsel for the parties.

s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge